Supreme Court, U.S.
FILED
941443 FEB 27 1995
OFFICE OF THE CLERK

No. 94-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD ADAMS and BALANCE CHOW,
*Petitioners*,

v.

FRED O. DICKINSON, III, and LAWTON CHILES,
*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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## QUESTION PRESENTED FOR REVIEW

Whether state courts may refuse to grant federal remedies under 42 U.S.C. §§ 1983 and 1988 to persons who successfully challenge state taxes as violating their rights under the Commerce Clause of the United States Constitution?

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*Respondents*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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## OPINIONS BELOW

The opinion of the Supreme Court of Florida denying Petitioners' § 1983 and § 1988 claims is reported at 646 So.2d 717 (Fla. 1994) at Appendix ("App.") 1a-16a. The decision of the Supreme Court of Florida denying Petitioners' motions for reconsideration or clarification and for attorney's fees is set forth at App. 17a-20a. The decision of the Circuit Court of the Ninth Judicial Circuit (Orange Cty., Fla.) granting Petitioners relief under § 1983 is not reported and appears at App. 22a-34a. The opinion of the United States District Court for the Middle District of Florida (Orlando Division), declining to entertain Petitioners' § 1983 and § 1988 claims, is not reported and appears at App. 35a-40a. The decision of the United States Court of Appeals for the Eleventh Circuit is not reported and appears at App. 41a.

## JURISDICTION

The judgment of the Supreme Court of Florida was issued on September 29, 1994. App. 1a. The Supreme Court of Florida subsequently denied Petitioners' motions for rehearing or clarification and for attorney's fees on November 30, 1994. App.

17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, provides:

> The Congress shall have Power. . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Supremacy Clause of the United States Constitution, Article VI establishes:

> This Constitution and the laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 provides, in pertinent part:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

Fla. Stat. Ann. § 319.231 (West Supp. 1995) provides:

§ 319.231 Additional fee imposed on certain motor vehicle title or registration-only transactions

(1) An impact fee of $295 is imposed on each original certificate of title issued for a motor vehicle previously titled outside of this state. The fee, which shall be deposited into the General Revenue Fund, shall not be refundable unless it is paid in error.

(2) The fee imposed by subsection (1) shall not apply to:

(a) Service-providing vehicles of those not-for-profit organizations which qualify for an exemption with respect to the purchase of a motor vehicle or mobile home under the provisions of s. 212.08.

(b) The title application for any motor vehicle owned by and operated exclusively for the personal use of:

1. Any member of the United States Armed Forces, or his spouse or dependent child, who is not a resident of this state and who is stationed in this state while in compliance with military orders.

2. Any former member of the United States Armed Forces, or his spouse or dependent child, who purchased such motor vehicle while stationed outside of Florida or who purchased the vehicle prior to departing the state, who has separated from the Armed Forces and was not dishonorably discharged or discharged for bad conduct, who was a resident of this state at the time of enlistment and at the time of discharge, and who applies for registration of such motor vehicle 6 months after discharge.

3. Any members of the United States Armed Forces, or his spouse or dependent child, who was a resident of this state at the time of enlistment, who purchased such motor vehicle while stationed outside of Florida or who purchased the vehicle prior to departing the state, and who is now reassigned by military order to this state.

4. Any spouse or dependent child of a member of the United States Armed Forces who loses his life while on active duty or who is listed by the Armed Forces as "missing-in-action."

(c) Title applications where a reassignment is being made by a licensed Florida motor vehicle dealer.

(d) The titling of any motor vehicle owned or exclusively operated by the state or by any county, municipality, or other governmental entity.

(e) The titling of a truck defined in s. 320.08(3)(d).

(f) The titling of any motor vehicle 25 model years old or older.

(g) The titling of a motor vehicle owned by any organization or person exempt under the provisions of s. 320.0655(2), s. 320.084(1), s. 320.0841, s. 320.0842(1), s. 320.089(2), s. 320.0893, or s. 320.10.

(h) Persons applying for temporary registration plates pursuant to s. 320.1325, unless permanent registration is applied for.

(3) The fee imposed by subsection (1) shall also be imposed on vehicles processed using the "registration-only" procedure, and payment of such fee shall be identified and retained in the motor vehicle registration records. However, the exemptions listed in subsection (2) shall also apply.

(4) Credit shall be applied towards the fee imposed by subsections (1) and (3) for any documented sales or use tax paid to this state at the time of sale, or any use tax paid to this state, if the title or registration-only application is made within 6 months of the date of purchase of the motor vehicle.

## STATEMENT OF THE CASE

This case presents the same question raised in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, No. 94-688 (Jan. 6, 1995) — that is, whether state courts may refuse to grant federal remedies under 42 U.S.C. §§ 1983 and 1988 to persons

who have successfully challenged state taxes as violating their rights under the Commerce Clause of the United States Constitution.

In 1990, the Florida Legislature enacted a motor vehicle impact fee. The fee imposed a $295 tax on cars purchased in other states that are subsequently registered in Florida by persons who establish permanent residency in Florida. *See* Fla. Stat. Ann. § 319.231 (West Supp. 1995). The statute provides a credit for Florida sales and use taxes paid on the vehicle, but does not provide a credit for out-of-state taxes paid on the same vehicle. *Id.*

In April 1990, Petitioner Richard Adams moved from Texas to Florida, and brought with him a car that had been titled in Texas. Under the motor vehicle impact fee, Mr. Adams was required to — and did — pay a $295 fee on the car. In August 1991, Petitioner Balance Chow moved from California to Florida, and brought with him a car that had previously been titled in California. Mr. Chow, though subject to the motor vehicle impact fee, did not pay the fee after moving to Florida.

In 1991, Petitioners challenged the constitutionality of the Florida impact fee in federal court. They filed an action in the United States District Court for the Middle District of Florida (Orlando Division), claiming that the fee was unconstitutional because it discriminated against interstate commerce in violation of the Commerce Clause of the United States Constitution. Petitioners named as defendants the executive director of the Department of Highway Safety & Motor Vehicles, then Leonard R. Mellon, acting in his official capacity, and the Governor of the State of Florida, Lawton Chiles, acting in his official capacity. Petitioners sought relief under § 1983 and § 1988, seeking among other things a declaratory judgment that the motor vehicle impact fee was unconstitutional, an injunction against enforcement of the fee, and attorney's fees. *See* App. 35a. On December 13, 1991, the district court dismissed Petitioners' complaint for lack of subject matter jurisdiction, due to the requirements of the Tax Injunction Act, 28 U.S.C. § 1341 (1988). *See* App. 36a. On

July 16, 1992, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision. *See* App. 41a.

On July 30, 1992, Petitioners refiled their action in Florida state court in the Circuit Court of the Ninth Judicial Circuit In And For Orange County, Florida. Petitioners named the same defendants and raised the same claims that they had raised in their federal action, including claims for declaratory and injunctive relief under § 1983 and § 1988. *See* App. 3a-4a.

Petitioners' complaint was consolidated with a class action pending in the same court. While the class action plaintiffs also challenged the motor vehicle impact fee on Commerce Clause grounds, they did not seek relief under § 1983 or § 1988. *Id.*

The trial court issued separate decisions in the consolidated cases, in each instance declaring the motor vehicle impact fee unconstitutional on Commerce Clause grounds. App. 26a. The court also granted relief to Petitioners under § 1983, and specifically rejected Respondents' argument that the Tax Injunction Act, 28 U.S.C. § 1341, prevented § 1983 claims from being heard in state court. *See* App. 25a-26a.

Respondents appealed the decisions in the two consolidated actions. App. 42a. On January 7, 1994, the Fifth District Court of Appeal issued an order, certifying both actions to the Supreme Court of Florida as presenting issues of great public importance. App. 43a. The Florida Supreme Court accepted jurisdiction. On September 29, 1994, after entertaining briefs and oral argument in the consolidated cases, the court held that the motor vehicle impact fee discriminated against interstate commerce in violation of the Commerce Clause. *Department of Revenue v. Kuhnlein*, 646 So.2d 717, 725 (Fla. 1994). "[T]here can be no question," the court held,

> but that a burden is placed on some out of state economic interests. Specifically, Florida has erected a barrier that gives Florida used-car sellers a substantial advantage over similar out-of-state sellers . . . . We also believe that the impact fee

> scheme fails under the United States Supreme Court's "internal consistency" test . . . . Accordingly, we conclude that the Florida impact fee does in fact result in discrimination against out-of-state economic interests in contravention of the Commerce Clause.

*Id.* at 724 (internal citations omitted).

Though finding that the impact fee was unconstitutional, the Florida Supreme Court nonetheless declined to entertain Petitioners' § 1983 and § 1988 claims. It simply stated that, "[b]ecause the statute must be declared facially unconstitutional, we need not and will not address the other issues raised by the parties." *Id.* at 725. As a result, the court did not specifically address Petitioners' arguments that Florida courts of general jurisdiction were required to entertain § 1983 and § 1988 claims since they entertained similar actions under state law, and had done so in this case. Nor did it specifically address Respondents' argument that, as characterized by the court, "Section 1983 was not an appropriate vehicle for challenging a state tax matter." *Id.* at 720.

Petitioners timely filed motions for rehearing or clarifica-tion and for attorney's fees. They reiterated their arguments that § 1983 applied to Commerce Clause challenges under *Dennis v. Higgins*, 498 U.S. 439 (1991), that the court was obligated to entertain their § 1983 and § 1988 claims under *Howlett v. Rose*, 496 U.S. 356 (1990) since it entertained similar actions under state law, and that Petitioners were entitled to attorney's fees as "prevailing" parties under § 1988. On November 30, 1994, the court issued an order rejecting both motions. App. 18a.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH *DENNIS V. HIGGINS*, 498 U.S. 439 (1991), AND *HOWLETT V. ROSE*, 496 U.S. 356 (1990).

The decision below conflicts with recent precedent from this Court. In particular, the Florida Supreme Court's failure to

entertain Petitioners' state-tax challenges under §§ 1983 and 1988 violates the requirements of *Dennis v. Higgins*, 498 U.S. 439 (1991), and *Howlett v. Rose*, 496 U.S. 356 (1990).

In *Dennis*, the Court recognized that Commerce Clause challenges may be brought under § 1983, ruling that "the Supreme Court of Nebraska erred in holding that petitioner's Commerce Clause claim could not be brought under 42 U.S.C. § 1983." 498 U.S. at 451. Plainly, then, to the extent the Florida Supreme Court assumed it need not entertain Petitioners' Commerce Clause challenges under § 1983 and § 1988, it failed to adhere to the requirements of *Dennis v. Higgins*.

In *Howlett v. Rose*, likewise, the Court made clear that under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, state courts do not have a free hand in determining whether to entertain § 1983 and § 1988 claims. At issue in *Howlett* was a Florida rule of law that conferred immunity on state governmental entities from federal civil rights actions under § 1983, even though the entities were not immune in otherwise identical state-law tort actions. The Court concluded that such discrimination against federal rights was prohibited under the Supremacy Clause of the United States Constitution. "[T]he Florida court's refusal to entertain . . . § 1983 claims," *Howlett* held, "when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." *Id.* at 375.

Just as in *Howlett*, it is clear that Florida courts of general jurisdiction entertain "similar state-law actions" to the one filed by Petitioners here. Florida law, for example, generally permits parties to file declaratory judgment actions, *see* Fla. Stat. Ann. § 86.011, (West Supp. 1995), and injunction actions, *see* Fla. Stat. Ann. § 86.061 (West 1987), challenging the validity of state laws. Even so, the Florida Supreme Court refused to entertain Petitioners' § 1983 claims for declaratory and injunctive relief or its claim for attorney's fees under § 1988. That is flatly inconsistent with the requirements of the Supremacy Clause, as this Court made clear in reviewing a similar decision from the Florida courts in *Howlett v. Rose*.

## II. AS THIS COURT RECOGNIZED BY GRANTING A PETITION FOR THE WRIT OF CERTIORARI IN *NATIONAL PRIVATE TRUCK COUNCIL, INC. V. OKLAHOMA TAX COMMISSION*, NO. 94-688 (JAN. 6, 1995), THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION ON WHICH STATE SUPREME COURTS ARE SHARPLY DIVIDED.

As this Court recognized by granting a petition for the writ of certiorari in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, No. 94-688 (Jan. 6, 1995), the decision below raises an important question of federal law, which has divided the supreme courts of several states.[1]

At issue in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 879 2d 137 (Okla. 1994) (per curiam) *cert. granted*, 63 U.S.L.W. 3513 (U.S. Jan. 6, 1995), as here, is a state court action challenging the validity of a state tax on Commerce Clause grounds. Specifically, the Oklahoma legislature enacted legislation imposing a tax on all motor carriers who operate trucks in Oklahoma that are registered in other states. The Oklahoma Supreme Court held that the taxes were discriminatory in violation of the Commerce Clause of the United States Constitution. *Id.* Nonetheless, the Oklahoma Supreme Court declined to entertain claims under §§ 1983 and 1988. Relying on the Tax Injunction Act and general principles of comity, the court held that plaintiffs were not "entitled to assert

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[1] Compare *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992), *cert. denied*, 113 S.Ct. 3002 (1993), and *Murtagh v. County of Berks*, 634 A.2d 179 (Pa. 1993), *cert. denied*, 114 S.Ct. 1397 (1994), which permitted § 1983 and § 1988 claims to be filed in state court in state tax cases, with *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 879 P.2d 137 (Okla. 1994) (per curiam), *cert. granted*, 63 U.S.L.W. 3513 (U.S. Jan. 6, 1995), and *North Dakota v. Quill*, 500 N.W.2d 196 (N.D.), *cert. denied*, 114 S.Ct. 173 (1993), which declined to entertain § 1983 and § 1988 claims in state court in state tax cases.

federally created remedies under §§ 1983 and 1988 in this state court action." *Id.* at 140.

*National Private Truck Council*, in short, raises precisely the same issues raised here. Both actions involve state taxes; both actions were filed in state courts of general jurisdiction; both actions established the invalidity of a state tax on Commerce Clause grounds; and in both actions state supreme courts declined to entertain claims for relief under § 1983 and § 1988. As the Court's disposition of *National Private Truck Council* will clarify the availability of § 1983 and § 1988 remedies in state tax cases, petitioners respectfully request the Court to grant certiorari in this case, vacate the decision below, and remand the case in light of its disposition of *National Private Truck Council*.

## CONCLUSION

The petition for the writ of certiorari to the Supreme Court of Florida should be granted.

Respectfully submitted,

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February 27, 1995

*Counsel for Petitioners*

# APPENDIX

BEST AVAILABLE COPY

SUPREME COURT OF FLORIDA

Nos. 82,994, 82,995

DEPARTMENT OF REVENUE, et al.,
Appellants/Cross-Appellees,

vs.

DAVID KUHNLEIN, et al.,
Appellees/Cross-Appellants.

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DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et al.,
Appellants/Cross-Appellees,

vs.

RICHARD ADAMS, et al.,
Appellees/Cross-Appellants.

[September 29, 1994]

KOGAN, J.

We have for review a question certified by the Fifth District Court of Appeal to be of great public importance, requiring immediate resolution by this Court. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

In 1990, the Florida Legislature passed an act imposing a $295 impact fee on cars purchased or titled in other states that then are registered in Florida by persons having or establishing permanent residency here. As later amended, credit was given to the extent that the registrant paid *Florida* sales and use taxes, though no credit is given for any out-of-state taxes paid on the same vehicle. The fee is not imposed upon tourists or temporary visitors to

Florida, nor upon used cars imported from out-of-state that are sold by Florida dealers.[1]

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[1] The statute provides:

(1) An impact fee of $295 is imposed on each original certificate of title issued for a motor vehicle previously titled outside of this state. The fee, which shall be deposited into the General Revenue Fund, shall not be refundable, unless it is paid in error.

(2) The fee imposed by subsection (1) shall not apply to:

(a) Service-providing vehicles of those not-for-profit organizations which qualify for an exemption with respect to the purchase of a motor vehicle or mobile home under the provisions of s. 212.08.

(b) The title application for any motor vehicle owned by and operated exclusively for the personal use of:

1. Any member of the United States Armed Forces, or his spouse or dependent child, who is not a resident of this state and who is stationed in this state while in compliance with military orders.

2. Any former member of the United States Armed Forces, or his spouse or dependent child, who purchased such motor vehicle while stationed outside of Florida or who purchased the vehicle prior to departing the state, who has separated from the Armed Forces and was not dishonorably discharged or discharged for bad conduct, who was a resident of this state at the time of enlistment and at the time of discharge, and who applies for registration of such motor vehicle within 6 months after discharge.

3. Any member of the United States Armed Forces, or his spouse or dependent child, who was a resident of this state at the time of enlistment, who purchased such motor vehicle while stationed outside of Florida or who purchased the vehicle prior to departing the state, and who is now reassigned by military order to this state.

4. Any spouse or dependent child of a member of the United States Armed Forces who loses his life while on active duty or who is listed by the Armed Forces as "missing-in-action." Such spouse or child must be a resident of this state and the serviceman must have been a resident of this state at the time of enlistment. Registration of such motor vehicle must occur within 1 year of the notification of the serviceman's death or of his status as "missing-in-action."

(c) Title applications where a reassignment is being made by a licensed Florida motor vehicle dealer.

Two separate groups later filed suit. The first group consisted of a certified class of plaintiffs who sued for declaratory judgment on grounds that the tax violated guarantees of the United States Constitution, including the Commerce Clause. The Florida Department of Revenue ("DOR") and the other State parties contend that several members of the class were legally required to pay the impact fee but have submitted no proof that they actually paid it. The State also argues that none of the class plaintiffs have applied for a refund, which allegedly would trigger circuit court jurisdiction under sections 26.021(2)(e) and 215.26, Florida Statutes (1993). Some of the plaintiffs dispute these claims.

The other group of plaintiffs filed an action arguing that the impact fee violated their civil rights. They sought relief under 42

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(d) The titling of any motor vehicle owned or exclusively operated by the state or by any county, municipality, or other governmental entity.

(e) The titling of a truck defined in s. 320.08(3)(d).

(f) The titling of any motor vehicle 25 model years old or older.

(g) The titling of a motor vehicle owned by any organization or person exempt under the provisions of s. 320.0655(2), s. 320.084(1), s. 320.0841, s. 320.0842(1), s. 320.089(2), s. 320.0893, or s. 320.10.

(h) Persons applying for temporary registration plates pursuant to s. 320.1325, unless permanent registration is applied for.

(3) The fee imposed by subsection (1) shall also be imposed on vehicles processed using the "registration-only" procedure, and payment of such fee shall be identified and retained in the motor vehicle registration records. However, the exemptions listed in subsection (2) shall also apply.

(4) Credit shall be applied towards the fee imposed by subsections (1) and (3) for any documented sales or use tax paid to this state at the time of sale, or any use tax paid to this state, if the title or registration-only application is made within 6 months of the date of purchase of the motor vehicle.

§ 319.231, Fla. Stat. (1991).

U.S.C. § 1983. The State contended that Section 1983 was not an appropriate vehicle for challenging a state tax matter.

The trial court consolidated the various cases. The trial court later entered final judgment finding section 319.231 unconstitutional under the Commerce Clause of the United States Constitution and ordering an immediate refund. It also ruled that a taxpayer could bring a Section 1983 action in state court in a tax matter. The trial court denied the Civil Rights Plaintiffs' claim that the statute violated the right to travel.

Initially, the State argues that various plaintiffs below lacked standing to pursue this case because they either have not paid the fee or have not requested a refund of any fee paid. We note that the trial court rejected the State's factual contentions with respect to some appellants, and the record adequately supports the judge's findings. We also do not believe there is any requirement that the plaintiff must pay the fee or request a refund, at least in the present case. The fact that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax is sufficient to create standing under Florida law.

Unlike the federal courts, Florida's circuit courts are tribunals of plenary jurisdiction. Art. V, § 5 Fla. Const. They have authority over any matter not expressly denied them by the constitution or applicable statutes. Accordingly, the doctrine of standing certainly exists in Florida, but not in the rigid sense employed in the federal system. We thus are not persuaded by the federal standing cases cited by the State.

We do agree that, except as otherwise required by the constitution, Florida recognizes a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented. *See Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993 (Fla. 1976). Put another way, the parties must not be requesting an advisory opinion, *id.*, except in those rare instances in which advisory opinions are authorized by the Constitution. *E.g.*, art. IV, § 1(c), Fla. Const. (advisory opinions to Governor).

In the context of declaratory judgment actions, we have reiterated much the same rule:

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.

*May v. Holley*, 59 So. 636, 639 (Fla. 1952), *reaffirmed by*, *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991).

The State here argues that the instant case does not meet the *May* requirements. We disagree. This Court accepted jurisdiction in *Martinez* (relying on *May*) to resolve a dispute between various groups and the Governor over the validity of workers' compensation laws, even though the case arguably came close to being a request for an advisory opinion. *Id.* at 1170-71. It is true that no party disputed standing there, but this Court still refused to decline jurisdiction sua sponte, because of the importance of the issue. *Id.* at 1171.

We find that the present case does involve an actual controversy that is directly affecting, or can directly affect, the lives of many Florida residents. This is so because the law in question here requires certain residents either to pay an allegedly illegal tax or risk being penalized by the State. In sum, the controversy here is certainly greater than the one that existed in *Martinez*.

Accordingly, standing existed for the plaintiffs below to bring this action for declaratory judgment.

The State next argues that the cause below was barred by the state's sovereign immunity, by an alleged common law rule that no one is entitled to the refund of an illegal tax, and by the requirements of Florida's refund statutes. Even if true, these are not proper reasons to bar a claim based on *constitutional* concerns. Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. Moreover, neither the common law nor a state statute can supersede a provision of the federal or state constitutions.

We also are unpersuaded by the State's claim that a refund claim cannot be cast as a class action. Any constitutional claim affecting a class of persons can be the proper subject of a class action, provided other procedural requirements are met, as they were here.

On the merits, we first address the Commerce Clause issue. The United States Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8. Justice Clarence Thomas recently explained how the Commerce Clause acts as a restriction on certain kinds of state actions:

> Though phased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.

*Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13 (1994). In deciding whether the Clause has been violated, the reviewing court first must determine whether the state action regulates even-handedly or imposes actual discrimination against interstate commerce. *Id.* "Discrimination" in this context means

> differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.

*Id.* at 1350. Discrimination exists when a state law taxes a transaction more heavily when it crosses state lines than when it occurs entirely within the state. *Id.*

If actual discrimination is present, the state action is "virtually per se invalid." *Id.* The State in question can defeat the presumption of invalidity only by showing that the statute advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory means. *Id.* at 1351.

On the question of discrimination, the class plaintiffs rely in part on the effect the impact fee will have on interstate commerce in used automobiles. They have argued that the impact fee will be applied to used vehicles purchased and titled out-of-state and then brought into Florida, but will not apply to used cars already titled in Florida and sold here. Accordingly, class plaintiffs argue that in-state dealers in used cars automatically will have a $295 advantage over similar out-of-state dealers.

We believe, as the State urges, that we cannot examine this argument apart from the overall vehicle taxing scheme adopted by Florida, which is more complex than what may first appear. As the State has noted, the overall tax impact consists of the interlocking effect of Florida and out-of-state sales taxes, the Florida use tax, and the Florida impact fee. We agree with the State that this taxing system itself, not any single part, must be examined by this Court. The United States Supreme Court itself has warned that reviewing courts must consider actual effects, not isolated technicalities. *American Trucking Assocs., Inc. v. Scheiner*, 483 U.S. 266, 295, 107 S. Ct. 2829, 2846, 97 L. Ed. 2d 226 (1987).

Other than fuel taxes and certain fees not at issue here, the primary tax upon vehicles in Florida is the sales tax, which is assessed against all vehicles sold in this state. The sales tax in turn is supplemented by a use tax assessed against certain out-of-state purchases of goods that are brought into Florida for use

here. Vehicles are included.[2] § 212.06, Fla. Stat. (1991). The overall purpose of the use tax is to recoup sales tax revenues the state otherwise would lose when goods purchased out-of-state are brought into Florida for use here. However, use taxes involve two special problems of a constitutional dimension, which states like Florida have attempted to resolve through use-tax exemptions.

The first of three problems is in determining when an out-of-state transaction actually was not motivated by a desire to bring an item of personal property into Florida for use here. The legislature has resolved this issue by a simple bright-line test: The use tax is presumptively inapplicable to tangible personal property purchased and used for at least six months in another jurisdiction of the United States. § 212.06(8)(a), Fla. Stat. (1991). Administrative rules promulgated by DOR further refine the test:

> There shall be a presumption that any . . . motor vehicle, or other vehicle purchased in another state, territory of the United States, or the District of Columbia but titled, registered, or licensed in this state is taxable [subject to some exceptions not relevant here]. This presumption may be rebutted only by documentary evidence that the person owning the . . . motor vehicle purchased the . . . motor vehicle in another state, territory of the United States, or the District of Columbia six (6) months or more prior to the time it is brought into this state.

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[2] Nothing in the statute or administrative rules treat sales of used cars any differently than new cars. *See* Fla. Admin. Code R. 12A-4.007(2)(a) (use tax is inapplicable only if "*the person owning the . . . motor vehicle* purchased the . . . motor vehicle in another state, territory of the United States, or the District of Columbia six (6) months or more prior to the time it is brought into this state."]. That being the case, the use tax itself applies to used vehicles purchased out of state for use in Florida, provided the other relevant conditions are met, no matter how long the used vehicle may have been used in another state by its prior owners.

Fla. Admin. Code R. 12A-1.007(2)(a). The rules go on to require that owners present proof that the vehicle lawfully was subject to the taxing authority of the other jurisdiction *and* that the tax on the vehicle was paid to that jurisdiction.[3] *Id.*

The second problem in use taxes is how to avoid the double taxation that otherwise might occur if two or more states are taxing the same vehicle. There is a potential constitutional pitfall here, based on the possibility that double taxation itself could be a serious disincentive to free trade among the states. In *Williams v. Vermont*, 472 U.S. 14, 105 S. Ct. 2465, 86 L. Ed. 2d 11 (1985), the Court expressly reserved judgment on whether the United States Constitution *requires* the states to credit out-of-state sales tax payments against an in-state use tax levied on the same item of personal property. *Id.* at 21-22, 105 S. Ct. at 2471. Thus, the vast majority of American jurisdictions presently give such a credit, *id.*, apparently heeding the warning flag raised by the nation's high Court.

Florida is among them, at least with regard to its use tax. Florida law provides that, once the use tax is applicable, credit must be given for any "like tax" paid to another American jurisdiction that is equal to or greater than Florida's tax. If the out-of-state tax was less, then the out-of-state dealer is held responsible for paying the difference to Florida. § 212.06(7), Fla. Stat. (1991). DOR administrative rules require the owner to present documentary evidence that the tax was paid. Fla. Admin. Code R. 12A-1.007(3)(a).

Of course, the problem immediately arises whether the $295 impact fee permits any credit for out-of-state taxes paid on a vehicle. It is true that subsection 319.231(4) expressly provides that the impact fee must be reduced by an amount equal to any

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[3] Credit is not allowed for taxes paid to a foreign nation. Fla. Admin. Code R. 12A-1.007(3)(b). Obviously, the Commerce Clause does not extend its free-trade guarantee to jurisdictions outside the United States, so the state does not infringe the Constitution by giving no credit for taxes paid to other nations.

sales *or use* tax paid to Florida. However, because of the way the legislature chose to structure its overall tax scheme, there never can be any actual transfer of credit through this statutory cross-reference. This is because the Florida use tax itself is *reduced* by the out-of-state tax, and any coverage thus is purely a Florida tax. The impact fee, in turn, would be reduced by the coverage, but this gives no credit for the out-of-state tax -- only for any remaining Florida tax.

Thus, we can examine the impact of this taxing scheme through a hypothetical. Assume that a Florida resident purchased a used car titled in another state for $5,000 subject to an out-of-state 6 percent sales tax, and the applicable sales and use tax in Florida also is 6 percent. The tax paid to the other state would be $300, which would be equal to the Florida use tax. If the vehicle were immediately titled in Florida, no use tax would be assessed because the owner would be entitled to a 100 percent credit based on these facts. Because no Florida use tax is assessed, the vehicle owner would not be entitled to any credit against the $295 impact fee. Thus, the overall tax would equal $300 paid to the other state plus $295 paid to Florida -- a total of $595.

Now assume that the same $5,000 used car were purchased in Florida from a Florida dealer. In that situation, the purchaser would pay the 6 percent sales tax, or $300. There would be no $295 impact fee because the vehicle either was previously titled in Florida or is being sold by a Florida dealer. § 319.231(2)(c), Fla. Stat. (1991). Thus, the total tax is only $300 for sale of the same automobile entirely within Florida.

A further examination of the mathematics of this taxing scheme shows the circumstances in which the $295 impact fee would be offset by the Florida use tax. So long as the Florida use tax and the out-of-state sales taxes are nearly the same, there would be little if any offset. This would be true no matter how expensive or inexpensive the used car might be. Offset would increase only to the extent that the out-of-state sales tax or any similar tax is very much less than the Florida use tax, or to the extent that an expensive vehicle's sale price exaggerates the dollar difference

between the Florida and out-of-state taxes. In other words, more expensive vehicles are more likely to escape the $295 impact fee.

In our hypothetical of the $5,000 use car, the use tax would offset the $295 impact fee only if the out-of-state sales tax and other similar taxes were at or near zero. For example, a zero percent out-of-state tax would mean that Florida would assess a $300 use tax against our hypothetical $5,000 used automobile, fully offsetting the $295 impact fee and resulting in a total tax of just $300.[4] However, if the sale price were $30,000, only a one-percent difference between the Florida and out-of-state taxes would mean that the $295 impact fee would be entirely offset.[5]

We are mindful of the State's argument that every vehicle titled in Florida by some point in time will pay at least $295 in taxes or impact fees to Florida. Certainly this will be true in the vast majority of cases,[6] but that fact in itself does not dispose of the Commerce Clause problem. The Commerce Clause is not concerned with the overall history of taxes paid to a state during the life of a vehicle; rather, the Commerce Clause looks to the question of "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*, 114 S. Ct. at 1350.

Here, there can be no question but that a burden is placed on some out-of-state economic interests. Specifically, Florida has

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[4] One other noteworthy feature of the impact fee is its highly regressive nature. Because it is set at a flat $295, it effectively imposes an increasingly higher tax as a percentage of total sale price as the price drops. There thus would be some situations in which the total out-of-state and Florida taxes on the vehicle would exceed its sale price.

[5] Suppose the Florida use tax is six percent and the similar out-of-state tax is only five percent. The out-of-state tax thus would be $1,500, and Florida would collect a $300 use tax to offset the lower out-of-state tax. Thus, the $295 impact fee would be entirely offset.

[6] It might not be true of some very low priced used vehicles brought into Florida for the first time and sold by a Florida dealer.

erected a financial barrier that gives Florida used-car sellers a substantial advantage over similar out-of-state sellers. In our hypothetical of the $5,000 used car, an out-of-state sale to a Florida resident would result in a total tax approximately 200 percent of what would be paid for the same transaction conducted entirely within Florida. This situation unquestionably favors in-state interests over out-of-state interests.

We also believe that the impact fee scheme fails under the United States Supreme Court's "internal consistency" test. Under this test,

> ["]the tax must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade [among the states].

*Armco, Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S. Ct. 2620, 2623, 81 L. Ed. 2d 540 (1984) (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169, 103 S. Ct. 2933, 2942, 77 L. Ed. 2d 545 (1983)); *accord American Trucking Assocs., Inc. v. Scheiner*, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987). There can be no doubt that the impact fee does in fact violate this test. For example, if Georgia and Alabama adopted Florida's impact fee, persons in those states would be deterred from coming to Florida to buy used vehicles. A similar impact fee throughout the United States clearly would tend to favor in-state commercial interests over out-of-state concerns, thus directly impinging upon the free-trade zone among the states created by the Commerce Clause.

Accordingly, we conclude that the Florida impact fee does in fact result in discrimination against out-of-state economic interests in contravention of the Commerce Clause. *Oregon Waste*. To be constitutionally permissible, the impact fee thus must be capable of surviving the "virtually per se invalid" test. This means the State must show that the statute advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory means. *Id.* As the United States Supreme Court has explained:

> Our cases require that justifications for discriminatory restrictions on commerce pass the "strictest scrutiny." The State's burden of justification is so heavy that "facial discrimination by itself may be a fatal defect."

*Id.* at 1351 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337, 99 S. Ct. 1727, 1737, 60 L. Ed. 2d 250 (1979)).

On this question, we first address the contention that this Court might eliminate any "fatal defect" by declaring unconstitutional and then severing the impact-fee exemption granted to Florida dealers. § 319.231(2)(c), Fla. Stat. (1991). We find that this will not eliminate the entire problem, and in fact would exacerbate still other problems of a constitutional dimension. Foremost, differential treatment still would remain with respect to used vehicles sold by nondealers. Thus, a private individual selling an older car would continue to have an advantage over out-of-state dealers or out-of-state individuals selling much the same car. We therefore find that there is no way to sever any portion of the statute to eliminate applicability of the "virtually per se invalid" test.

There are two elements the State must establish under the test: (a) that the statute advances a legitimate local purpose, and (b) that the purpose cannot be adequately served by reasonable nondiscriminatory means. We assume for present purposes, without deciding, that the State has advanced a legitimate local purpose in this case: the need to obtain adequate road-maintenance and construction revenues from those who use the roads. As the *Oregon Waste* Court noted,

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden[s]." Nevertheless, one of the central purposes of the Clause was to prevent States from "exacting more than a just share" from interstate commerce.

*Oregon Waste*, 114 S. Ct. at 1351 (citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S. Ct. 546, 548, 82 L. Ed. 823 (1938)).

However, there obviously are less discriminatory methods for Florida to recoup the cost of road construction and maintenance. As one of only many examples, an increase in the fuel tax would be far fairer, because fuel consumption has a direct relationship to the wear-and-tear a vehicle (whether titled in Florida or not) inflicts on state road systems. Likewise, Florida could impose a mileage tax or could impose the $295 impact fee on all vehicles titled in Florida, regardless of any previous title history.

Moreover, there is no rational reason why the legislature chose a tax as regressive as this one, in light of the purpose announced by the State. Nothing here suggests that more expensive vehicles somehow cause less wear-and-tear on Florida's roads, Yet, the way this tax is structured, expensive vehicles are more likely to wholly avoid paying the $295 impact fee. The least expensive vehicles, meanwhile, are more likely to bear the full brunt of the fee. This is an irrational distinction with no genuine bearing on the State's objective here.

We find that Florida is in fact exacting more than a just share against interstate interests here, because there is at best only a tenuous relationship between the State's objective and the means chosen to raise revenues.

Because the statute must be declared facially unconstitutional, we need not and will not address the other issues raised by the parties. We note the procedural issues the State has raised with respect to the civil rights plaintiffs. However, even assuming that Section 1983 was an inappropriate means of suing in this instance, those parties that chose this method still are entitled to have their petitions treated as a request for a proper remedy. Art. V, § 2(a), Fla. Const. At a minimum, we would be required to treat all of the petitions filed below as requests for relief by way of declaratory judgment. Relief accordingly will be granted to all on that basis.

Finally, the State has argued that it should be entitled to develop some form of retroactive remedy under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990). This presumably would

be a retroactive tax against all Florida vehicle titles not previously subject to the impact fee.

We find that the trial court below gave due consideration to this possibility and was within its discretion in rejecting the State's proposal. While the trial court gave several reasons, we find one sufficient in itself: There would be grave difficulty in assessing a retroactive tax. The record below indicates that the Florida Department of Highway Safety & Motor Vehicle would be unable to collect the tax from a very substantial percentage of title holders, whose addresses cannot be kept current. The Department further has averred that it lacks the resources necessary to track down these title holders.

As the trial court below noted, the impact fee was void from its inception because the legislature acted wholly outside its constitutional powers. The only clear and certain remedy is a full refund to all who have paid this illegal tax. The result reached by the trial court and its refund order therefore are approved. We need not and therefore do not address the equal protection arguments raised by the parties, since the statute must be stricken for the Commerce Clause violation.

It is so ordered.

GRIMES, C.J., OVERTON and HARDING, JJ., and McDONALD, Senior Justice, concur.
SHAW, J., concurs in result only.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Two Direct Appeals and Cross-Appeals of Judgment of Trial Court, in and for Orange County. Lawrence R. Kirkwood, Judge, Case Nos. CI 92-6224 & CI 92-5912. Certified by the District Court of Appeal, Fifth District, Case Nos. 93-2848 & 93-2849

Robert A. Butterworth, Attorney General; and Eric J. Taylor and Harry F. Chiles, Assistant Attorneys General, Tallahassee, Florida,

for Appellants/Cross-Appellees

Christopher K. Kay and Michael J. Beaudine of Foley & Lardner, Orlando, Florida; and Kimball R. Anderson, W. Gordon Dobie and Bruce R. Braun of Winston & Strawn, Chicago, Illinois, on behalf of David Kuhnlein, et al.; James K. Green of James K. Green, P.A., West Palm Beach, Florida and Robert W. Smith, Orlando, Florida, Cooperating Attorneys for American Civil Liberties Union Foundation of Florida, Inc., on behalf of Richard Adams and Balance Chow,

for Appellees/Cross-Appellants

James M. Ervin, Jr. and John M. Gillies of Holland & Knight, Tallahassee, Florida; and Jeffrey S. Sutton of Jones, Day, Reavis & Pogue, Columbus, Ohio.

Amicus Curiae for R.R. Donnelly & Sons Company

SUPREME COURT OF FLORIDA

WEDNESDAY, NOVEMBER 30, 1994

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| DEPARTMENT OF REVENUE, et al., | * | |
| | * | |
| Appellants/Cross-Appellees, | * | CASE NO. 82,994 |
| | * | |
| v. | * | Circuit Court |
| | * | No. CI 92-6224 |
| | * | (Orange) |
| DAVID KUHNLEIN, et al., | * | |
| | * | District court |
| | * | of Appeals |
| Appellees/Cross-Appellants. | * | 5th District - |
| | * | No. 93-2848 |
| * * * * * * * * * * * * * * * * * * * * * * * | | |
| | * | CONSOLIDATED |
| | * | CASES |
| DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et al., | * | |
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| Appellants/Cross-Appellees, | * | CASE NO. 82,995 |
| | * | |
| v. | * | Circuit Court |
| | * | No. CI 92-5912 |
| | * | (Orange) |
| RICHARD ADAMS, et al., | * | |
| | * | District Court |
| | * | of Appeal. |
| Appellees/Cross-Appellants. | * | 5th District - |
| | * | No. 93-2849 |
| * * * * * * * * * * * * * * * * * * * * * * * | | |

Appellees/Cross-Appellants Adams and Crows' Motion for Rehearing or Clarification as to Case No. 82,995 is hereby denied.
OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur
GRIMES, C.J., dissents

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Appellants/Cross-Appellees Department of Revenue, et al.'s Motion to Strike That Part of Appellees' Reply Brief Not In Accordance With the Florida Rules of Appellate Procedure and This Court's Order of January 12, 1994, is hereby denied.
GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur

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Appellees/Cross-Appellants David Kuhnlein, et al.'s Motion to Remand Pursuant to Appellant Rule 9.600(b), or in the Alternative to Stay Defendants From Sending Class Notice Without Court Approval, and supplement thereto, is hereby denied.
GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur

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Appellees/Cross-Appellants Adams and Chow's Motion for Attorneys Fees is hereby denied.
OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur
GRIMES, C.J., dissents

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The Florida Legislature moves for leave to appear in this case as amicus curiae solely for the purpose of asking for a clarification of our opinion with regard to the fiscal prerogatives of the legislative branch. The motion is granted, and we readopt and clarify our opinion as follows.

We agree with the Legislature that it has authority to fashion a retroactive remedy under *McKesson* with respect to taxes declared illegal under the Commerce Clause. As *McKesson* notes, that remedy need not be perfect. In the present case, however, any conceivable retroactive remedy the Legislature might fashion necessarily would be so highly imperfect and involve such delays as to result in fundamental injustice. Accordingly, we believe the trial court was within its discretion in ordering a refund based on the facts at hand.

We do not imply, however, that the courts of this state can order refunds in any or even most cases of this type. The facts of the present case are unusual because the number of individuals *not* subject to the illegal tax is enormous, the ability of the state to locate a very substantial percentage of them is unlikely, and the delays that inevitably would result from the effort of locating them would be grossly unfair to all involved -- most especially those who paid the tax. This situation is substantially different from the facts of *McKesson*.

In so saying we strongly emphasize that the courts should show great deference to the legislative prerogative. If there is any reasonable way that prerogative may be honored without substantial injustice to the taxpayers of this state, then a court reviewing a tax case of this type should give the Legislature the opportunity to fashion a retroactive remedy within a reasonable period of time. As a general rule, a "reasonable period of time" means by the end of the next regular legislative session plus the period of time in which the Governor must review bills approved by both houses.

We also note that the Legislature in its motion has represented to this Court that it will not attempt to fashion a retroactive remedy even if given leave to do so. This is a fact that factors in our decision on clarification, if only because it tacitly acknowledges our conclusions as to this case. We do believe, however, that it would be of great benefit to the courts if the Legislature sought leave to intervene at the trial level in Commerce Clause cases of this type to address the question of a

retroactive remedy. When such leave is sought, a trial court clearly would abuse its discretion by denying leave to intervene. Then the record on appeal would contain a full account of the Legislature's views as to the retroactive remedy.

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur

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TC

cc: Hon. Fran Carlton, Clerk
Hon. Frank J. Habershaw, Clerk
Hon. Lawrence Kirkwood, Judge

Mr. Eric J. Taylor
Mr. Harry F. Chiles
Mr. Christopher K. Kay
Mr. Michael J. Beaudine
Mr. Kimball R. Anderson
Mr. W. Gordon Dobie
Mr. Bruce R. Braun
Mr. James K. Green
Mr. Robert W. Smith
Mr. James M. Erwin, Jr.
Mr. John M. Gillies
Mr. Jeffrey S. Sutton
Ms. Maryann B. Gall
Ms. Diann L. Smith
Mr. D. Stephen Kahn
Mr. Thomas Ross McSwain
Ms. B. Elaine New
Ms. Josephine A. Schultz
Mr. Jeffrey S. Badgley

A True Copy
Test:

[Illegible] [SEAL]
Clerk, Supreme Court

# MANDATE

## SUPREME COURT OF FLORIDA

*To the Honorable, the Judges of the:*
Circuit Court in and for Orange County, Florida

*WHEREAS, in that certain cause filed in this Court styled:*
DEPARTMENT OF REVENUE, et al. v. DAVID KUHNLEIN, et al.

&

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et al.

v.

RICHARD ADAMS, et al.

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*Case Nos.:* 82,994 & 82,995

*Your Case Nos.:* CI 92-6224 & CI 92-5912

*DCA Case Nos.:* 93-2848 & 93-2849

The attached opinion was rendered on: September 29, 1994

*YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.*

*WITNESS the Honorable Stephen H. Grimes, Chief Justice of the Supreme Court of Florida and the Seal of Said Court at Tallahassee, the Capital, on this 30th day of November, 1994.*

[SEAL]

*Clerk of the Supreme Court of Florida*

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

RICHARD ADAMS and
BALANCE CHOW,
Plaintiffs,

v.

CASE NO.: CI 92-5912
DIVISION: 34

FRED O. DICKINSON, III, in his official capacity as Executive Director of the DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, an agency of the State of Florida, and LAWTON CHILES, in his official capacity as Governor and chief executive officer of the State of Florida,
Defendants.

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FINAL SUMMARY JUDGMENT FOR THE PLAINTIFFS

This matter came before the Court on Plaintiffs' Motion for Summary Judgment and the parties' Trial Briefs. This case has been consolidated with *Kuhnlein v. Florida Department of Revenue*, Circuit Court Case No. CI 92-6224, a class action in which a final summary judgment has been entered on behalf of the plaintiffs. A more detailed explanation of the court's analysis may be found in the final summary judgment entered in the class action. Plaintiffs ADAMS and CHOW seek similar declaratory and injunctive relief, under similar legal theories, but do not seek a refund in this court. This case also presents different procedural questions which have been the focus of some debate.

The Court makes the following findings of fact and conclusions of law:

1. Under the section 319.321, an impact fee of $295 is imposed on each original certificate of title issued for a motor vehicle "previously titled outside of this state." *See* § 319.231(1), Fla. Stat. (1991). It also applies to certain vehicles that are not titled in Florida but must be registered in the state. *See* § 319.231(3), Fla. Stat. (1991). Thus, the fee applies only to articles of commerce that come from outside Florida.

2. Owners are entitled to a tax credit for sales and use taxes actually paid to Florida within six months of purchasing the vehicle. *See* § 319.231(4), Fla. Stat. (1991); ch. 91-82, § 13, Laws of Fla.

3. The impact fee is applied without regard to the residence of the owner. Thus, in each of the following scenarios, the owner must pay the impact fee:

a) A person moves from Atlanta, Georgia to Jacksonville, Florida and brings with him a vehicle titled in the State of Georgia. That person must title or register the vehicle in Florida.

b) A Florida resident purchases a new vehicle in Florida in 1989 (prior to the enactment of section 319.231) and pays all the applicable sales taxes and fees to the State of Florida. That person moves to the State of Georgia in 1990 and obtains a Georgia certificate of title for the vehicle. That person then resumes his Florida residency in 1992.

c) A Florida resident purchases a vehicle with a Georgia title from his brother-in-law in Atlanta.

d) A Jacksonville business purchases 50 new vehicles previously titled in another state directly from an automobile manufacturer or a Georgia dealer rather than from a Florida dealer.

4. In contrast, the impact fee does not have to be paid for new vehicles purchased in Florida because those vehicles were not previously titled outside the state. *See* §§ 319.21, -.23(1), Fla. Stat. (1991). In addition, licensed Florida automobile dealers are

exempt from paying the fee. *see* § 319.231(2)(c), Fla. Stat. (1991). Each of the Plaintiffs paid the impact fee.

5. Originally, the impact fee was imposed on *every* motor vehicle when it was initially registered in Florida. *See* § 320.072, Fla. Stat. (Supp. 1990).

6. The Department of Revenue interpreted the 1990 statute so that payment of the sales or use tax fully satisfied an owner's obligation to pay the impact fee. *See also* Op. Att'y Gen. Fla. 91-1 (1991). Under this interpretation of the statute, the Department of Revenue collected significantly less money than original projections indicated. The 1990 statute was completely revised by chapter 91-82, Laws of Florida, in order to recoup that shortfall and close "loopholes" in the law.

7. Neither the Defendants nor the Legislature performed any impact study prior to enacting chapter 91-82 to analyze the relative burdens placed on Florida's roadway system by vehicles previously titled outside the State on the one hand and new vehicles or tourists vehicles on the other.

8. Plaintiffs are residents of Florida who have recently migrated to this State. Plaintiff CHOW has not yet paid the fee on one of his vehicles. Plaintiff ADAMS has already paid the impact fee but seeks a declaration that the statute is unconstitutional in order to facilitate administrative refund. Neither plaintiff seeks a refund in this case.

9. Plaintiff has proceeded under Chapter 86, Florida Statutes for Declaratory Relief. "The circuit courts have jurisdiction to declare rights, status and other equitable or legal relations *whether or not further relief is or could be claimed.*" *See* § 86.011, Fla. Stat. (1991). Declaratory judgment actions are specifically authorized to determine the validity of state enactments. *Board of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67, 69 (Fla. 1st DCA 1958). Thus, plaintiffs may seek a declaration of the validity of section 319.231 under the declaratory judgment act even though they have already paid the impact fee and seek no refund in this suit.

10. In addition, Plaintiff CHOW is seeking an injunction to test the validity of the statute and secure relief against the prospective effect of the statute. This procedure is also authorized. *Id.*; *see also* § 86.061, Fla. Stat. (1991).

11. The court finds also that Plaintiff CHOW's suit for injunction under 42 U.S.C. § 1983 is not precluded by the operation of 28 U.S.C. § 1341 (the Tax Injunction Act). A federal cause of action is created by 42 U.S.C. § 1983 which is enforceable in this court, a court of general jurisdiction in the State of Florida. *Howlett v. Rose*, 496 U.S. 356, 367, 378, 378 n. 22, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). In contrast, 28 U.S.C. § 1341 provides only that "[t]he [federal] district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Nothing in 28 U.S.C. § 1341 deprives this court of jurisdiction over a § 1983 claim. On the contrary, the remand of this case from federal court was premised on this court's ability to consider precisely these issues. In short Title 28 merely modifies the forum in which this Title 42 cause of action may be heard. Indeed, at least one tax injunction suit arising from a state court and *based on the commerce clause* has been considered by the Supreme Court without eliciting the slightest comment on the jurisdiction of the state court to entertain the suit. *See Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 464 (1981). Moreover, the Defendants interpretation would effectively close *all* courts to an otherwise valid claim. This is clearly not the result contemplated by Congress in passing the Tax Injunction Act. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 552, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981) ("[T]his legislation was first and foremost a vehicle to limit drastically *federal district court jurisdiction* to interfere with so important a local concern as the collection of taxes."). It has long been recognized that a taxpayer forced to proceed in state court may assert his or her federal rights even though they cannot be litigated in federal district court. *Id.* at 513 (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300-301, 63 S.

Ct. 1070, 87 L. Ed. 1407 (1943)). It is irrelevant that the federal courts do not have *jurisdiction* to enter an injunction in this tax matter. The state courts must retain the power to enforce § 1983 through injunctive relief. *Cf. Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233-34, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987).

12. Section 319.231 violates the commerce clause of the U.S. Constitution by assessing an excise tax on an article of commerce *solely* on the basis of the article's origin. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988), *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ____, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992).

13. The statute facially discriminates against interstate commerce and is subjected to the strictest scrutiny. *Chemical Waste Mgmt.*, 504 U.S. at ___, 119 L. Ed. 2d at 130, 132; *Hughes v. Oklahoma*, 441 U.S. 322, 337, 99 S. Ct. 1727, ___, 60 L. Ed. 2d 250, 262 (1979).

14. The courts have traditionally viewed patently discriminatory taxation schemes as virtually per se violations of the clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, ____, 57 L. Ed. 2d 475, 481 (1978); *Chemical Waste Mgmt.*, 504 U.S. at ____, 19 L. Ed. 2d at 132 n. 5. Moreover, the virtually per se rule of invalidity applies regardless of whether the State intended to protect local industries or only sought to respond to legitimate local concerns. *Chemical Waste Mgmt.*, 504 U.S. at ____, 119 L. Ed. 2d at 133 n. 6.

15. In the past, a facially discriminatory statute like the impact fee would have been stricken without further analysis. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 2081, 90 L. Ed. 2d 552, 559 (1990) and cases cited therein. However, the United States Supreme Court leaves open the possibility that a State may validate its discriminatory law by showing that the statute advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *New Energy*

*Co.*, 486 U.S. at 278; *Chemical Waste Mgmt.*, 504 U.S. at ____, 119 L. Ed. 2d at 132.

16. Florida had a number of legitimate objectives in passing the impact fee. First and foremost, the taxes are deemed to compensate the State for a vehicle's use of the public roads and to be a fair contribution to the construction of new roadways. *See* § 320.23, Fla. Stat. (1991). In addition, some of the funds have been funneled into the Law Enforcement Trust Fund. *See* Appendix B, Sub. Ex. No. 1, Plaintiffs' Motion for Summary Judgment.

17. The cases, however, demonstrate that Florida could serve whatever legitimate interests it has through more reasonable and *nondiscriminatory* means. There is no logical basis to distinguish between out-of-state vehicles and vehicles titled initially in Florida or titled by dealers. The State has introduced no evidence that out-of-state vehicles present unique difficulties that in-state vehicles do not share. Comparing the interests claimed by the Defendants to those claimed in *Chemical Waste Management v. Hunt*, for example, it becomes obvious that section 319.231 is subject to the same infirmities as the Alabama law. *See Chemical Waste Mgmt.*, 504 U.S. at ___, 119 L. Ed. 2d at 130, 133, 134.

18. If the "impact" of building new roadways to accommodate additional vehicles is the rationale for the fee, it should apply to *all* vehicles on the same basis. Another possible response is to tax mileage traveled by all vehicles within the state. The latter scheme would also apportion the cost of maintaining roadways fairly to itinerant workers, tourists, and part-time residents. There are doubtless thousands of other nondiscriminatory tax plans that would accomplish the State's legitimate purposes. Therefore, like the additional fee in *Chemical Waste Management v. Hunt*, the impact fee in the instant case must be struck down. *See also Delta Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 317, 321, 322-24 (Fla. 1984)(Facially discriminatory tax credit was found unconstitutional while an excise tax *which applied to all purchasers of gasoline* was upheld).

19. The State's arguments to the contrary are completely unavailing. The State mistakenly relies on the holding of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1669, 51 L. Ed. 2d 326 (1977), because the four-prong test announced in *Complete Auto* specifically incorporates the Supreme Court's jurisprudence on facially discriminatory enactments. Thus, under the *Complete Auto* test, a tax can only be upheld when it does not discriminate against interstate commerce and is not unfairly apportioned. *Id.*, 430 U.S. at 278. Neither statement is true in this case.

20. The Defendants have suggested that the impact fee "simply" makes new residents or those who purchase their vehicles outside Florida pay their "fair share." The United States Supreme Court addressed a similar issue in *American Trucking Associations v. Scheiner*, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987). In that case, Pennsylvania applied a higher flat tax on out-of-state vehicles for the privilege of using Pennsylvania's highways and argued that it was justified because out-of-state users should pay their fair share of the cost of maintaining the public highways. The Supreme Court held that before a flat user fee can be valid it *must not discriminate* against interstate commerce and travel and it must reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed. *Id.* at 290, 292, 295. Neither criterion is met in the instant case.

21. The State also cannot succeed by asserting that section 319.231 is not a "commercial statute" and does not promote any commercial activity in Florida. In cases where a statute patently discriminates against goods because of their origin, both the State's aim in passing the legislation and the actual effect on in-state and out-of-state business are irrelevant. *See Philadelphia v. New Jersey*, 437 U.S. at 626; *New Energy Co.*, 486 U.S. at 276.

22. Finally, the State suggests that if section 319.231 is unconstitutional it is because motor vehicle dealers are exempt from paying the tax. *See* § 319.231(2)(c), Fla. Stat. (1991). The State argues that the appropriate remedy is to strike the dealers'

exemption to create a nondiscriminatory and thus constitutional taxation scheme. *Cf. Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459, 463-64 (Fla. 1992). The State claims that eliminating the dealer exemption would in effect remove the discriminatory effect of the statute since it would apply to *all* vehicles which entered Florida since 1991.

23. Underlying this argument is the assumption that all vehicles sold by dealers were previously titled outside the state. In fact, automobile dealers must apply for an *original* certificate of title on new vehicles using the manufacturer's statement of origin. *See* §§ 319.21, 319.23(1), Fla. Stat. (1991). Thus, new vehicles purchased in Florida are not subject to the impact fee at all.

24. Even if the manufacturer's statement of origin were treated like a certificate of title for the purpose of assessing the impact fee, removing the dealer exemption would not remove the constitutional difficulty. The fee would still be assessed solely on the basis of the origin of the vehicle. The effect would be to encourage manufacturers to relocate to Florida and to unfairly benefit the very few manufacturers who title their vehicles in Florida at the expense of the national interest in interstate commerce. This is true even if there is no indigenous manufacturer. *Cf. Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 406, 104 S. Ct. 1856, 80 L. Ed. 2d 388 (1984)("Whether the discriminatory tax diverts new business into the State or merely prevents current business from being diverted elsewhere, it is *still* a discriminatory tax. . ."). As pointed out above, a litigant does not need to show that a patently discriminatory act actually benefits an in-state interest. *New Energy Co.*, 486 U.S. at 276.

25. The court has considered whether it would be appropriate to simply eliminate the phrase "previously titled outside of this state," § 319.231(1), Fla. Stat., because the clause is not severable and such a radical alteration would do violence to the principle of separation of powers. *See Cramp v. Board of Public Instruction*, 137 So. 2d 828, 830 (Fla. 1962); *Gates v. City of Sanford*, 566 So. 2d 47, 49 (Fla. 5th DCA), *rev. dism'd*, 576 So. 2d 287 (Fla. 1990). Other "editorial" actions, such as restoring

the full exemption for individuals who paid the State sales and use tax, would far exceed this court's power and would fail to give proper deference to the principle of separation of powers. *Brown v. State*, 358 So. 2d 16, 20 (Fla. 1978); *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991). Under these circumstances, the court has no option but to declare the entire statute invalid.

26. Moreover, this is a case where the Legislature has enacted a law which is beyond its power to enact. *Cf. Martinez v. Scanlan*, 582 So. 2d 1167, 1174 (Fla. 1991). Thus, the statute is void *ab initio*. *Id.*; *McCormick v. Bounetheau*, 139 Fla. 461, 190 So. 882, 883 (1939); *City of Winter Haven v. A.M. Klemm & Son*, 132 Fla. 334, 181 So. 153, 165 (1938). Thus, the invalidation of section 319.231 completely removes the tax liability.

27. Plaintiffs also challenge the validity of the impact fee scheme under the Privileges and Immunities Clause of the fourteenth amendment which *inter alia* protects the rights of citizens to migrate to other states without suffering a penalty for doing so. Although this is the approach that has been adopted by some members of the United States Supreme Court in right to migrate cases, it is essentially an argument that Plaintiffs right to travel has been violated. Interestingly enough, the federal constitutional right to travel has occasionally been linked with the commerce clause as well as the Privileges and Immunities Clause of the fourteenth amendment. *See, e.g., United States v. Guest*, 383 U.S. 745, 758-59, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).

28. Regardless of the origin of the federally protected right, it is clear that it is a *personal* right. *Nordlinger v. Hahn*, 505 U.S. at ___, 20 L. Ed. at 12-13; *Dunn v. Blumstein*, 405 U.S. 330, 341, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). It does not apply to protect interstate transfer of goods. *McCoy-Elkhorn Coal Corp. v. United States Envtl. Protection Agency*, 622 F.2d 260, 266 (6th Cir. 1980). The impact fee is being assessed on an object, not on a person. The right to travel does not inhere in the vehicles that people use to travel but in the persons who are traveling.

29. Nothing in the impact fee provision prevents nonresidents from settling in Florida or deprives new residents of their property interest in their automobiles. The statute makes no distinction between residents and nonresidents. Thus, cases like *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948), which dealt with discrimination between residents and *non*residents, are inapplicable to the instant case. Actually, *Toomer* and cases like it implicate the Privileges and Immunities Clause of article 4, section 2 of the United States Constitution not the fourteenth amendment of the same. *See Zobel v. Williams*, 457 U.S. 55, 59 n. 5, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982); *but see id.* at 74 (O'Connor, J. concurring in the judgment).

30. On the other hand, not all migrants to Florida are required to pay the fee, *i.e.*, it is not a tax on those entering the States. Individuals who travel by sea, air, rail, bus, rental vehicle or as passengers in vehicles which are subject to the fee *have no bar whatsoever to their travel*. Residents who own an out-of-state automobile are not taxed if they either determine that they will not use the vehicle on Florida's roadways or keep the vehicle outside the State. There is no direct or indirect tax on the number of individuals who use the vehicle to enter Florida. *Cf. Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 18 L. Ed. 745 (1868) (Nevada statute which imposed a tax on each person who left the state by railroad violated right of those individuals to travel even though the railroad company was held responsible for the tax).

31. In effect, the impact fee is a user fee. The States may constitutionally assess fees on vehicles using their facilities without infringing the right to travel. *Hendrick v. Maryland*, 235 U.S. 610, 624, 35 S. Ct. 140, 59 L. Ed. 385 (1915) (registration fees); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 714, 92 S. Ct. 1349, 31 L. Ed. 620 (1972) (airport user fee); *see also Williams v. Fears*, 179 U.S. 270, 21 S. Ct. 128, 45 L. Ed. 186 (1900) (incidental and remote impacts on the constitutional right to travel do not violate that right).

32. The cases cited by the Plaintiffs generally address statutes which impair the right to travel by creating classifications which penalize the right, such as a distinction between long-term and short-term residents. *See generally Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986). These durational residency cases are inapposite since the impact fee statute draws no distinction between long-term and short-term residents.

33. Thus, the statute applies on its face *and in operation* to nonresidents who wish to move to Florida and to individuals who are already Florida residents but who obtain a vehicle titled outside the State. *Cf. Dunn v. Blumstein*, 405 U.S. at 340-41 (A duration residence requirement operates to penalize those persons, *and only those persons*, who have exercised their constitutional right of interstate migration [citation omitted]).

34. Even if the statute did classify residents on the basis of when they entered the state, durational residency requirements and waiting period are *not* per se violations of the right to travel. *See, e.g., Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258-59, 84 S. Ct. 1076, 39 L. Ed. 2d 306 (1974). A constitutional violation has only been found when a waiting period or classification deprived the new resident of "an immediate and pressing need for life and health like food, clothing and shelter." *Id.* at 260 n.15. *Cf. Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975); *Martinez v. Bynum*, 461 U.S. 321, 327 n. 6, 103 S. Ct. 1838, 75 L. Ed. 2d 879 (1983) (citing *Starns v. Malkerson*, 401 U.S. 985, 91 S. Ct. 1231, 28 L. Ed. 2d 527 (1971) and *Sturgis v. Washington*, 414 U.S. 1057, 94 S. Ct. 563, 38 L. Ed. 2d 464 (1973)). Right to travel analysis does not even apply to regulations like state licensing requirements which may have far more devastating effects on an individual's right to travel than the fee in this case. *Shapiro v. Thompson*, 394 U.S. 618, 638 n. 21, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969). The "right" to use a particular vehicle for transportation is not so essential a right that a distinction between new and long-time residents would violate the right to travel.

35. Plaintiffs also challenge the validity of the impact fee provisions under the equal protection clause of the *federal* constitution citing *Williams v. Vermont*, 327 U.S. 14, 105 S. Ct. 2465, 86 L. Ed. 11 (1985). In *Williams*, Vermont imposed a user fee on all vehicles registered in the State. Vermont granted a full tax exemption if the Vermont sales tax had been paid. Vermont also granted a tax credit for any sales and use taxes paid in another state who had a reciprocal agreement. But this tax credit was available *only* if the taxpayer was a resident of Vermont at the time the other state's tax was paid.

36. In contrast, the fee in the instant case is merely offset by the payment of the *Florida* sales tax. The law does not discriminate between residents and nonresidents in application of the credit. While non-Floridians are not subject to the state sales tax under ordinary circumstances, they may pay the sales tax or a user fee which will offset the impact fee. The statute simply does not create a classification that would be subject to equal protection analysis. Although the exemption for licensed automobile dealers arguably violates the rational relationship test by discriminating against out-of-state businesses, Plaintiffs lack standing to raise that challenge.

37. Unlike the Class Plaintiffs in the companion case, Plaintiffs here do not seek a refund in this action. Therefore, this court grants declaratory and injunctive relief as requested. The injunction is granted under 42 U.S.C. § 1983 *et seq.*, but, in the event that act is found to be inapplicable, the court alternatively holds that the injunction is appropriate as supplemental relief to the declaratory judgment action under Florida law.

Therefore, it is CONSIDERED, ORDERED AND ADJUDGED that

1. Section 319.231, Florida Statutes, is declared to be unconstitutional and invalid *ab initio*.

2. The Defendants, their agents and employees are hereby enjoined from enforcing the provisions of section 319.231 and from collecting the impact fees purportedly authorized thereunder.

DON AND ORDERED in Chambers, at Orlando, Orange County, Florida, this 30th day of November, 1993.

/s/ Lawrence R. Kirkwood
LAWRENCE R. KIRKWOOD,
Circuit Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RICHARD ADAMS &
DALANCE CHOW,

Plaintiffs,

v. CASE NO. 91-0652-CIV-ORL-18

LEONARD R. MELLON, in his official capacity as executive director of The Department of Highway Safety & Motor Vehicles, an agency of the State of Florida, & LAWTON CHILES, in his official capacity as Governor and Chief Executive Officer of the State of Florida,

Defendants.

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ORDER

Plaintiffs bring this action pursuant to the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1983 and 1988 (1988). Plaintiffs seek a declaratory judgment that the impact fee described in section 319.231(1) of the Florida Statutes (1991) is unconstitutional and an injunction preventing state officials from collecting the fee. Defendants filed a motion to dismiss alleging that the Tax Injunction Act, 28 U.S.C. § 1431 (1988), and the Eleventh Amendment to the United States Constitution bar the court from exercising federal jurisdiction in this action. Plaintiffs responded in opposition to defendants'

motion. Based on a review of the allegations in plaintiffs' complaint and the relevant law, the court finds that Tax Injunction Act precludes federal jurisdiction in this action.

I. Facts

In 1991, the Florida Legislature created section 319.231 (1) which provides that "an impact fee of $295.00 is imposed on each original certificate of title issued for a motor vehicle previously titled outside of this state. The fee, which shall be deposited into the General Revenue Fund, shall not be refundable unless it is paid in error." Fla. Stat. § 319.231(1)(1991); 1991 Fl. Law ch. 91-82. At the same time, the Legislature deleted a similar impact fee on motor vehicle registration from section 320.072. 1991 Fla. Laws ch. 91-82. The legislative amendments became effective on July 1, 1991. *Id.*

In April 1990, Richard Adams (Adams) moved from Texas to Florida. When he moved, Adams brought a car that he had purchased in Texas. In February 1991, to receive a Florida certificate of title for his car, Adams paid the impact fee formerly described in section 320.072.

In August 1991, Dalance Chow (Chow) moved from California to Florida. When he moved, Chow brought a car that he had purchased in California. Because his car was previously titled in California, section 319.231(1) requires Chow to pay an impact fee to obtain a Florida certificate of title for his car.

In their complaint, plaintiffs allege that the Florida impact fee deprives plaintiffs of due process of law and equal protection pursuant to the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, and violates the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. In Count I, plaintiffs seek a declaratory judgment that section 319.231 is unconstitutional. In Count II, Chow requests that the court permanently enjoin defendants from requiring Chow to comply with section 319.231.

## II. Legal Discussion

### A. Standard of Review for Motion to Dismiss

For purposes of a motion to dismiss, the court must view the allegations of the complaint in the light most favorable to the plaintiff and consider the allegations of the complaint as true. *See Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 994-95 (11th Cir. 1983). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden of showing that he has properly invoked the court's jurisdiction. *Barton v. City of Eustis*, 415 F. Supp. 1355, 1357 (M.D. Fla. 1976).

### B. The Tax Injunction Act

The Tax Injunction Act provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341. The Act limits federal jurisdiction which would otherwise exist. *Osceola v. Florida Dep't. of Revenue*, 893 F.2d 1231, 1232 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 674 (1991); *see Winicki v. Mallard*, 783 F.2d 1567, 1570 (11th Cir. 1986) (holding that unless a plaintiff shows that the Tax Injunction Act is inapplicable, a federal court may properly dismiss a section 1983 action that alleges an unconstitutional tax scheme), *cert. denied*, 479 U.S. 815 (1986). The Act precludes exercise of federal jurisdiction if two conditions are met: (1) the relief requested by the plaintiff will enjoin, suspend or restrain a state tax assessment, and (2) the state affords the plaintiff a plain, speedy and efficient remedy. *Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir. 1986) (citing *Williams v. City of Dothan*, 745 F.2d 1406, 1411 (11th Cir. 1984), *cert. denied*, 479 U.S. 884 (1986). In their motion to dismiss, defendants assert that both elements are present in plaintiffs' complaint, and therefore, the court should dismiss this action.

1. Relief Requested.

The Tax Injunction Act applies to plaintiffs' claims for declaratory judgment and injunctive relief. *See Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 338 (1990); *Osceola*, 893 F.2d at 1233. Plaintiffs claim, however, that the impact fee provided for in section 319.231(1) is not a "tax under state law," and thus, the Act is not a bar to federal jurisdiction. To support their claim, plaintiffs cite Florida case law for the proposition that impact fees are not taxes to the extent the fees are commensurate with the costs of regulation. Yet, plaintiffs' authority is not dispositive of the issue because Congressional intent, not Florida law, controls the question whether an assessment is a "tax under state law" pursuant to the Tax Injunction Act. *See Tramel v. Schrader*, 505 F.2d 1310, 1315 n.7 (5th Cir. 1975); *see also Wright v. McClain*, 835 F.2d 143, 144 (6th Cir. 1987) (holding that definition of "tax under state law" is a question of federal law within the meaning of the term as employed by Congress in section 1341).

When Congress enacted the Tax Injunction Act, it intended to limit drastically federal court jurisdiction to interfere with a state's administration of its own financing. *Rosewell v. LaSalle Nat'l Bank*, 450 F.2d 503, 522 (1980) (citing 81 Cong. Rec. 1415 (1937) (remarks of Sen. Bone)); *Osceola*, 873 F.2d at 1232. Because the impact fee described in section 319.231 is deposited into the Florida general revenue fund, the court finds that federal jurisdiction would interfere with Florida's revenue collection process. *See Tramel*, 505 F.2d at 1316 (holding special street improvement assessments are taxes pursuant to section 1314 because federal jurisdiction would frustrate the state revenue collection process); *see also Williams*, 745 F.2d at 1411 (citing *Tramel* as authority and finding special street improvement assessments constitute taxes for the purposes of section 1341).

Plaintiffs also cite a Sixth Circuit decision for the proposition that the impact fee is not a tax because it is a punitive levy or privilege fee. *See Wright*, 835 F.2d at 145. Yet, the Sixth Circuit defined taxes to include assessments intended to defray

costs to the general public. *Id.* The impact fee is deposited into a general revenue fund, and therefore, the court finds that the fee is intended to defray costs to the general public. *See Id.; Schneider Transp. Inc. v. Cattanach,* 657 F.2d 128, 132 (7th Cir. 1981) (holding vehicle registration fees which are imposed to raise revenue and deposited into transportation funds for transportation purposes, rather than to identify vehicles for regulation, are taxes), *cert. denied,* 455 U.S. 909 (1982). Because the impact fee defrays costs to the general public and because the exercise of federal jurisdiction over its collection would disrupt Florida's financing scheme, the court finds that section 319.231(1) is a "tax under state law."

2. Plain, Speedy and Efficient Remedy.

Because plaintiffs seek to enjoin enforcement of a state tax, the court must dismiss this action unless plaintiffs show that they lack a plain, speedy and efficient remedy in state court. *A Bonding Co. v. Sunnuck,* 629 F.2d 1127, 1130 (5th Cir. 1980). Under Florida law, trial courts have jurisdiction to determine any question of construction or validity arising under section 319.231(1) and to grant declaratory judgments and supplementary relief when necessary and proper. *See* Fla. Const. art. V, § 5; Fla. Stat. §§ 86.011, 86.021, 86.061 (1989 & Supp. I 1990). Trial court decisions are appealable through Florida appellate courts to the Supreme Court of Florida and to the United States Supreme Court. *See* Fla. Const. art V, §§ 3, 4; 28 U.S.C. § 1257. Accordingly, the court finds that Florida law affords plaintiffs a full hearing and judicial determination at which they can raise any and all constitutional objections to section 319.231(1). *See A. Bonding,* 629 F.2d at 1130 (holding that state statutory provisions for declaratory judgment and injunction were adequate remedies under section 1341). Therefore, the court concludes that plaintiffs have a plain, speedy and efficient remedy under Florida law. *See California v. Grace Brethren Church,* 457 U.S. 393, 411 (citing *Rosewell,* 450 U.S. at 512-13, for the proposition that "plain, speedy and efficient remedy" means state procedures that give a full hearing and judicial determination of a taxpayer's constitutional objections).

## III. Conclusion

Based on the allegations in plaintiffs' complaint and the relevant law, the court finds that plaintiffs have not properly invoked the jurisdiction of the court. Because plaintiffs seek to enjoin a state tax statute and Florida law provides plaintiffs with a plain, speedy and efficient remedy in Florida courts, the Tax Injunction Act precludes this court's exercise of federal jurisdiction over plaintiffs' action. Accordingly, the court GRANTS defendants' motion to dismiss for lack of subject matter jurisdiction. Doc. 3.

It is SO ORDERED in Orlando, Florida, this 13th day of December 1991.

/s/ [illegible]
G. KENDALL SHARP
United States District Judge

Copies to all counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 92-2031
Non-Argument Calendar

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D.C. Docket No. 91-652-CIV-ORL-18

RICHARD ADAMS,
DALANCE CHOW

Plaintiffs-Appellants,

versus

FRED O. DICKINSON, III, in his official capacity as Executive Director of the Department of Highway Safety and Motor Vehicles, an Agency of the State of Florida; LAWTON CHILES, Governor, in his official capacity as Governor and chief executive officer of the State of Florida,

Defendants-Appellees.

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Appeal from the United States District Court
for the Middle District of Florida

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(July 16, 1992)

Before TJOFLAT, Chief Judge, HATCHETT and DUBINA, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

Costs are taxed against plaintiffs-appellants.

Entered: July 16, 1992
For the Court: Miguel J. Cortez, Clerk

Issued as mandate:
Sept. 4, 1992

By: /s/ [illegible]
Deputy Clerk

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

RICHARD ADAMS and
BALANCE CHOW,
Plaintiffs/Appellees,
v.
FRED O. DICKINSON, III, in his official capacity as Executive Director of the DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, an agency of the State of Florida, and LAWTON CHILES, in his official capacity as Governor and Chief Executive Officer of the State of Florida,
Defendants/Appellants.

CASE NO.: CI 92-5912

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NOTICE OF APPEAL

NOTICE IS HEREBY given that the Defendants/Appellants, Fred O. Dickinson, III, Department of Highway Safety and Motor Vehicles; Lawton Chiles, Governor, State of Florida, appeals to the Fifth District Court of Appeals, the Final Summary Judgment Order of this Court rendered on November 30, 1993. The order held Section 319.231, Florida Statutes, unconstitutional and finding a 42 U.S.C. Section 1983 claim could be brought in a state court in a state tax action.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FIFTH DISTRICT

DEPARTMENT OF HIGHWAY SAFETY
AND MOTOR VEHICLES, et al.,

Appellant/Cross-Appellee,

v. CASE NO. 93-2849

RICHARD ADAMS and
BALANCE CHOW,

Appellee/Cross-Appellant.

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DATE: January 7, 1994

BY ORDER OF THE COURT:

The Appellants herein seek review of an order of the Circuit Court for Orange County, Florida, declaring unconstitutional Section 319.231, Florida Statutes (Motor Vehicle Impact Fee Law), which authorizes the collection of an additional fee on each original certificate of title issued for a motor vehicle previously titled outside the State of Florida. Moreover, such order enjoins the Appellants from further collecting such fee. Appellees have cross appealed such order.

Whether the Motor Vehicle Impact Fee Law is constitutional or unconstitutional will arguably have state-wide application. Accordingly, it is

ORDERED that this Court certifies that the constitutionality of Section 319.231, Florida Statutes, is an issue of great public important and one which will have a great effect on the proper administration of justice throughout the state. Accordingly, this Court requests the Supreme Court of Florida to accept jurisdiction of this cause pursuant to Florida Rule of Appellate Procedure 9.125.

I hereby certify that the foregoing is a
true copy of the original court order

[SEAL]

[illegible]

Supreme Court, U.S.
FILED
MAY 10 1995
CLERK

(2)

No. 94-1443

**In the**
**Supreme Court of the United States**
October Term, 1994

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RICHARD ADAMS and BALANCE CHOW,
*Petitioners,*

v.

FRED O. DICKINSON, III, and LAWTON CHILES
*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA**

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# RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Are state courts required to entertain suits brought under 42 U.S.C. § 1983 in state tax cases when such suits are barred in the federal courts by the Tax Injunction Act, 28 U.S.C. § 1341 and the challenging taxpayer has full review of his federal "rights" using state remedies?

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---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA**

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# RESPONDENTS' BRIEF IN OPPOSITION

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## OPINION BELOW

Petitioners seek review of *Department of Revenue, et al. v. Kuhnlein, et al.*, 646 So. 2d 717 (Fla. 1994), decision of the Supreme Court of Florida.

## STATEMENT OF THE CASE

In 1990, the Florida Legislature passed "[a]n act relating to taxation" which contained an amendment to Section 320.072, Florida Statutes (1989). [1]/ *See* Chapter 90-132, Laws of Florida. Section 74 of Chapter 90-132 amended existing Section 320.072, Florida Statutes, by imposing an impact fee of $295.00 on all automobiles and certain other vehicles at the time of the automobile's "initial application for registration" in Florida. Section 320.072(1)(b), Florida Statutes (1990 Supp). The monies collected under this statute were deposited into the Law Enforcement Trust Fund of the Department of Highway Safety and Motor Vehicles. *See* Section 320.072(5), Florida Statutes (1990 Supp.) The law became effective on July 1, 1990. *See* Chapter 90-132, Section 98, Laws of Florida.

Because of certain collection problems, Section 320.072(1)(b), was rewritten during the 1991 legislative session. Ch. 91-82, Laws of Florida. Under Section 9 of Chapter 91-82, the $295.00 impact fee would no longer to be imposed on registration but "on each original certificate of title issued for

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[1]/ The Petitioners state that Section 319.231, Florida Statutes, was enacted by the Florida Legislature in 1990. This is an incorrect statement. Section 320.072 contained the initial "impact fee." This law was amended in 1990 to include the fee. Section 319.231, Florida Statutes, was not enacted until 1991. *See* Chapter 91-82, Section 9, Laws of Florida.

a motor vehicle previously titled outside of this state." The impact fee was imposed on a "title" and not on a person and only Florida residents were required to register and title vehicles in Florida. *See* Sections 320.02, 320.37 and 320.38, Florida Statutes (1989). Credit for Florida sales and use taxes paid to the State was applied to the $295.00 impact fee. Section 9, Chapter 91-82, Laws of Florida. No credit was given for sales taxes paid in another state. The funds generated by the impact fee were deposited into the General Revenue Fund. *Id.* The altered and expanded impact fee provisions were removed from Section 320.072, Florida Statutes [2]/, and recodified as Section 319.231, Florida Statutes (1991). The act became law on July 1, 1991. *See* Chapter 91-82, Section 13, Laws of Florida.

On May 3, 1988, Petitioner Richard Adams, while a resident of Texas, purchased a 1988 Chevrolet Beretta. Mr. Adams paid Texas sales taxes at the time of the purchase. Mr. Adams moved to Florida in April, 1990, and became a Florida resident. In February, 1991, Mr. Adams applied to the State of Florida to register and title his Chevrolet. At the time of applying for the Florida certificate of title and registration, Mr. Adams was required to

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[2]/ See Section 10, Chapter 91-82, Laws of Florida.

pay the $295.00 impact fee.[3]/ Mr. Adams received no credit in Florida for the sales taxes he paid to Texas in 1988 at the time he purchased the Chevrolet.

In August, 1990, Petitioner Balance Chow, while a resident of California, purchased a used 1979 Toyota Corona. Mr. Chow paid California sales taxes at the time of the vehicle's purchase and then titled and registered his automobile in that state. Mr. Chow moved to Florida in August, 1991, and became a Florida resident. At the time of the initiation of this action in 1991, Mr. Chow had not yet applied to the State of Florida to register and title his Toyota.

The Petitioners initially brought this action in the United States District Court for the Middle District of Florida (Orlando Division). *Adams v. Mellon*, USDC, MD Fla., Case No.91-652. They challenged the constitutionality of Section 319.231, Florida Statutes (1991), claiming that the law discriminated against interstate commerce, was in violation of the Commerce Clause, infringed on the Petitioners' right to travel and violated the Equal Protection Clause of the 14th Amendment to the United States

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[3]/ While Mr. Adams claims in Para.12 of his Complaint to have paid the impact fee, Section 319.231 was not yet in existence in February, 1991. Mr. Adams, if he did pay the impact fee, would actually have paid the impact fee under the provisions of Section 320.072(1)(b), Florida Statutes (1990 Supp.), a fact he later admits in para. 10.

Constitution. Petitioners sued Lawton Chiles, Governor of Florida, and Leonard R. Mellon[4]/, Executive Director of Florida's Department of Highway Safety and Motor Vehicles, in their "official capacity." Petitioners brought the action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief as well as an award of attorney's fees under 42 U.S.C. § 1988. Respondents moved to dismiss the case on jurisdictional grounds based upon the Tax Injunction Act, 28 U.S.C. § 1341. The case was dismissed on December 13, 1991, with the district court basing its decision on the Tax Injunction Act. Petitioners appealed the decision to the 11th Circuit Court of Appeals which affirmed, *per curiam*, the District Court's ruling. *See Adams v. Mellon*, U.S. Court of Appeals, 11th Circuit, Case No. 92-2031(July 20, 1992). After the federal appellate court affirmance, this case was brought in circuit court.

The Petitioners filed their action in Circuit Court for the Ninth Judicial, in and for Orange County, Orlando, Florida, on July 30,1992. *Adams et al. v. Dickinson, et al.*, Case No. CI92-5912. Petitioners' complaint was, in all material aspects, identical to the complaint they had earlier filed in the

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4/ The Suit initially named Mr. Mellon who was then the Executive Director of Florida's Department of Highway Safety and Motor Vehicles. Mr. Mellon died on and was replaced by Mr. Fred O. Dickinson, III, the present Respondent and Executive Director of Florida's Department of Highway Safety and Motor Vehicles.

United States District Court. Like the earlier case, Petitioners challenged the constitutionality of Section 319.231, Florida Statutes (1991), claiming that the law discriminated against interstate commerce, was in violation of the Commerce Clause of the United States Constitution, infringed on the Petitioners' right to travel, denied them due process and violated the Equal Protection Clause of the 14th Amendment to the United States Constitution. Additionally, Petitioners claimed a violation of the Florida Constitution. Petitioners sued Lawton Chiles, Governor of Florida, and Fred O. Dickinson, III, Executive Director of Florida's Department of Highway Safety and Motor Vehicles. Both were sued in their "official capacity." Petitioners brought the state action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief as well as an award of attorney's fees under 42 U.S.C. § 1988.

About the same time that Petitioners were filing their action in state court, other persons who paid the impact fee filed a class action suit seeking a refund of fees paid. *Kuhnlein v. Department of Revenue*, Ninth Judicial Circuit Court, Case No. 92-6442.[5]/ While the Class Plaintiffs sought a

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[5]/ Hereafter, the following designation will be used to distinguish between the plaintiffs of the consolidated cases: the plaintiffs of the *Kuhnlein* case will be referred to as the "Class Plaintiffs," plaintiffs of the *Adams* case below will be referred to their status before this Court, Petitioners.

declaration that the impact fee was unconstitutional under the Commerce Clause, they did not frame their action under § 1983 and did not seek attorney's fees under § 1988. The Class Plaintiffs restricted their case to Florida law and remedies. The Class Plaintiffs moved to have their case consolidated with the *Adams* case. The *Kuhnlein* and *Adams* cases were consolidated on April 22, 1993.

The procedural issues, as framed by the Respondents for the Florida Ninth Judicial Circuit Court, and as pertinent to this case, were:

> Whether the Florida Circuit Court had jurisdiction to hear the Petitioners' civil rights claim, brought under 42 U.S.C. Section 1983, when such a claim was barred by the doctrine of sovereign immunity?; and,
>
> Whether the Florida Circuit Court had jurisdiction to hear the Petitioners' civil rights claim, brought under 42 U.S.C. Section 1983, when such a cause of action could not be brought in, and in fact was dismissed from, a federal court because of the Tax Injunction Act, 28 U.S.C. Section 1341 and the Eleventh Amendment to the United States Constitution?

Petitioners and the Respondents cross moved for summary judgment with a hearing held on the motions on October 5, 1993. The trial court issued two

separate decisions, one in *Kuhnlein* and one for *Adams*, on November 30, 1993. In both judgments, the Circuit Court held Section 319.231, Florida Statutes, was unconstitutional as it violated the Commerce Clause of the United States Constitution by discriminating against used vehicles that are in Florida for the first time. This part of the two orders were rendered under Florida's declaratory judgment act, Chapter 86, Florida Statutes.

In *Adams*, the trial court also ruled that the Petitioners, could bring a 42 U.S.C. § 1983 action in state court against the State, its agencies and officials in a tax matter. The circuit court held the Tax Injunction Act did not preclude the action in a state court and that this Court's decisions in *Howlett v. Rose*, 496 U.S. 356 (1990), and *Dennis v. Higgins*, 498 U.S. 439 (1991), required enforcement of a § 1983 claim in a Florida court. Based on this reasoning, the Circuit Court granted injunctive relief, though **not** declaratory relief, to the Petitioners under § 1983. [6/]

The Defendants filed their Notice of Appeal on December 2, 1993. The Class Plaintiffs in *Kuhnlein* moved the Fifth District Court of Appeals to have the case certified to the Supreme Court of Florida, under Rule 9.125, Florida Rules

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[6/] No injunctive relief was granted to the Class Plaintiffs. Their relief was restricted to declaratory relief an and order to refund all monies collected by the State.

of Appellate Procedure, as a question of great public importance. On January 7, 1994, the Fifth District Court of Appeal issued an order so certifying the question to the Florida Supreme Court. The Florida Supreme Court accepted jurisdiction on January 11, 1994.

On January 26, 1994, while the case was pending before the Supreme Court of Florida, the Petitioners filed a motion for attorney's fees, based upon § 1988, with the Supreme Court. The court, after briefing and oral argument, issued its opinion on September 29, 1994, in the combined cases. *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994). The court affirmed, finding that Section 319.231, Florida Statutes, was unconstitutional because the impact fee violated of the Commerce Clause.

In the proceeding before the Florida Supreme Court there was virtually no discussion of 42 U.S.C. § 1983. The court noted that the Petitioners had brought a civil rights action challenging the impact fee. *Id.*, 646 So. 2d, at 720. The court did not again address the § 1983 issue until very late in its opinion. In discussing its handling of the § 1983 issue, stated:

> Because the statute must be declared facially unconstitutional, we need not **and will not** address the other issues raised by the parties. We note the procedural issues the State has raised with respect to the civil rights plaintiffs. However, even

> assuming that Section 1983 was an inappropriate means of suing in this instance, those parties that chose this method are still entitled to have their petitions treated as a request for a proper remedy. Art. V, § 2(a), Fla. Const. At a minimum, we would be required to treat all of the petitions filed below as **requests for relief by way of declaratory judgment. Relief accordingly will be granted to all on that basis.**

*Id.*, 646 So. 2d, at 725 (e.s.). Thus, the Florida Supreme Court did not address the trial court's holding that Florida courts were required to entertain § 1983 actions, did not affirm the trial court's injunctive relief to the Petitioners and did not address the Respondents' legal arguments against the trial court's holding as it pertains to state tax matters in state courts.

On October 11, 1994, Petitioners served a motion for rehearing or clarification. In their motion, the Petitioners recognized that the Supreme Court "found it unnecessary to decide the issue of whether Section 1983 provided a remedy in this case . . ." Petitioners then requested the court to "clarify [the Supreme Court's] opinion to the lower tribunal to award attorneys' fees and costs under Section 1988." In their motion for clarification, the Petitioners also reminded the Supreme Court that

Petitioners had previously filed a request for appellate attorney's fees in the case, but that the Court had not ruled on that motion.

On November 30, 1994, the court specifically denied the Petitioners' request for clarification and the request for appellate attorney's fees under 42 U.S.C. § 1988. *Department of Highway Safety and Motor Vehicles v. Adams*, 646 So. 2d, at 726.

**REASONS FOR DENYING THE WRIT**

The decision in this case does not merit further review. While the opinion of the Supreme Court of Florida did not permit the Petitioners to achieve any of the relief they requested under 42 U.S.C. § 1983, that result is not in conflict with the Supremacy Clause of the Constitution or any decision of this Court. This Court has never mandated that state courts must, under all circumstances and without exception, entertain a § 1983 claim for relief in a state court. Such a decision would be particularly inappropriate in this case where the claim for relief could not be entertained in a federal court. Petitioners initially sought their § 1983 relief in a federal court but were dismissed therefrom based on the Tax Injunction Act. Prohibiting use of § 1983 in a state court tax refund case does not upset the balance of judicial uniformity required by the Supremacy Clause and federalism.

Petitioners also rely on the petitioner's position in *National*

*Private Truck Council, Inc. v. Oklahoma Tax Commission*, No. 94-688, and suggest that the states are "sharply divided" on the question of whether the states can enforce "federal rights" in state courts on state tax matters. This is just not so. The states are all in unison; "federal rights" clearly can be and are enforced and vindicated in state tax matters before state courts without aid of § 1983. The ability to have federal rights raised and vindicated is the very cornerstone of the Tax Injunction Act and the multitude of decisions by this Court interpreting that Act and the phrase "plain, speedy and efficient" remedy. Those wishing to preserve their federal rights in a tax case can easily do so in a state court. The Petition in this case , therefore, should be denied.

1. **THE OPINION OF THE SUPREME COURT OF FLORIDA DOES NOT CONFLICT WITH EITHER *HOWLETT v. ROSE*, 496 U.S. 356 (1990) or *DENNIS v. HIGGINS*, 498 U.S. 439 (1991)**

Contrary to the Petitioners' claim, the opinion of the Supreme Court of Florida is *not* contrary to *Howlett v. Rose* or *Dennis v. Higgins*. Neither *Dennis* nor *Howlett* addressed Petitioners' assertion that a state court is **required** to entertain a federal remedy, such as 42 U.S.C. § 1983, in a state tax case. This is particularly important when independent state's remedies adequately address federal constitutional rights and, as a result, a federal court is prohibited from

exercising jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341, and this Court's decision in *Fair Assessment In Real Estate Assn. v. McNary*, 454 U.S. 100 (1981). Petitioners had their federal constitutional claims addressed in the state court. The Supreme Court of Florida declared Section 319.231, Florida Statutes, violated the Commerce Clause, Art. I, § 8, United States Constitution. Moreover, Petitioners received all the substantive relief they requested, though the court granted that relief through state law remedies.[7]/

Neither *Dennis* or *Howlett* are in conflict with the Florida Supreme Court's opinion. *Dennis* was part of a series of cases in which this Court addressed whether or not a particular part of the Constitution or laws of the United States created individual rights that could be vindicated, upon violation, in an action under § 1983. *See, e.g. Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, (1989) (Supremacy Clause does not create rights enforceable under § 1983). The issue, as framed at the beginning of *Dennis*, was "whether suits for violations of the Commerce Clause may be brought under 93 Stat. 1284, as amended, 42 U.S.C. § 1983." *Dennis*, 498 U.S., at 440. This was the only issue presented to this Court. Therefore, *Dennis*'

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7/ The Class Plaintiffs also received their retroactive relief in the form of a refund of the impact fees paid. *See Kuhnlein*, 646 So. 2d, at 726-727.

holding is limited to the ruling that a Commerce Clause violation can state a claim under § 1983 in state or federal court. But the Court never addressed, much less ruled, that state courts are required to entertain such suits. The fact that a Commerce Clause violation does state a § 1983 claim and may be heard in a state court, however, does *not* eliminate a state's immunity from such § 1983 suits.

*Dennis* has often confused persons challenging state taxes because, by coincidence, *Dennis*' Commerce Clause/§ 1983 issue arose out of a state case that just happened to involve a state tax. The holding of *Dennis* would not have been any different if the facts of that case had instead involved a different Commerce Clause violation, for example, a state law affecting interstate banking. In other words, the underlying tax dispute had no effect whatsoever on the resolution of the issue.

*Howlett* is also distinguishable from this case. Howlett initiated a § 1983 suit against the School Board of Pinellas County in the Circuit Court in Pinellas County. *Howlett*, 496 U.S. at 359. Florida's circuit court, relying on the Florida Supreme Court's decision in *Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987), dismissed Howlett's § 1983 claims. *Howlett*, 496 U.S. at 359. This Court reversed that decision, holding that Howlett's § 1983 claims against the School Board could be heard in a Florida State Court. The Court reasoned that, unlike the State

which was not a "person" within the meaning of § 1983 and could not be sued under that law in state or federal court, *Howlett*, at 496 U.S., at 376, the School Board was a "person" under § 1983 and would "be subject to suit under § 1983 in a federal court." *Howlett* , 496 U.S., at 365. That being the case, the Court held the state court could not then use a state law immunity to bar the federal claim in the state court. *Howlett*, at 496 U.S., at 376.

There are two key distinctions between this case and *Howlett*. The first is the governmental body being sued and whether that governmental body could be sued in federal court in the first instance. Under *Howlett*, local government agencies, which are <u>not</u> protected by the Eleventh Amendment from suit in federal court, can be sued under § 1983 in either a state or federal court. *Will v. Michigan Department of State Police*, 491 U.S.58, 70 (1989) ("States are protected by the Eleventh Amendment while municipalities are not) *citing Monell v. New York City Dept. of Social Services* 436 U.S. 658, 690, n.54 (1978). The rationale of *Will* is that § 1983 was not "intended to disregard the well established immunity of a State from being sued without its consent." *Will*, 491 U.S., at 69. In other words, § 1983 does not authorize an action against a state in state court. *Howlett*, 496 U.S., at 356. Therefore, if a § 1983 action cannot be brought against a state in federal court, such a federal remedy cannot be heard in a state court. *Howlett* is consistent with both *Will*

(states cannot be sued) and *Monell v. New York City Department of Social Services*, supra (local governmental authorities are "persons" under § 1983 and can be sued in state or federal court).

The second distinction is the fact that a state law basis was not used, in contrast to what occurred in *Howlett*, to deny Petitioners' federal remedy under § 1983. The underlying purpose of the Supremacy Clause itself, uniformity, does not require the states to entertain a § 1983 claim in a tax matter in a state court. The fact that states may deny litigants the use of § 1983 in state tax matters in state courts is **not** inconsistent with the Constitution or any decision of this Court. To the contrary, the results of the state courts are consistent with the underlying thesis of *Howlett*; the need for uniformity, concurrency and consistency in jurisdiction that is mandated by the Supremacy Clause of the Constitution. *Howlett*, at 496 U.S., at 367. This Court discussed in detail in Part III of *Howlett* the meaning and need for uniformity and concurrency that has been created by the Supremacy Clause in the phrase "supreme Law of the Land." *Howlett*, 496 U.S., at 367-375. Suffice it to say that where federal remedial actions can and are heard in federal courts, state courts cannot create reasons not to hear the federal claim. That was the failing of the Florida courts in *Howlett*; those courts used a Florida law to defeat the hearing of a federal claim under § 1983 when that

very claim could have been asserted against the School Board in a federal court.

However, the legal landscape is quite different here. Unlike *Howlett*, Florida, and other state courts that have not entertained a § 1983 claim in a state tax matter are not utilizing a state law reason to deny a federal claim that could be heard in a federal court. Because of the Tax Injunction Act, as well as the Eleventh Amendment and the reasoning of *Will*, state tax matters cannot be heard in a federal court. This very case was dismissed from federal court. Rather than there being an inconsistency, the refusal to entertain a § 1983 claim in a state tax matter is consistent and uniform with federal law. Consequently, the Supremacy Clause is not injured. Federalism and the uniform enforcement of federal law is upheld.

But even where a state court, in a state tax action, denies a party the use of the federal remedy of § 1983, that does not mean the party is without an avenue to address his constitutional rights. In order for the states to maintain their immunity from having state tax matters heard in a federal court, Congress has required in 28 U.S.C. § 1341 that the states provide a "plain, speedy and efficient [state] remedy." This Court has said that a state remedy is "plain, speedy and efficient" when the taxpayer has the opportunity to pay the disputed tax and seek a refund, *California v. Grace Brethren*, 457 U.S. 393, 417 (1982),

*Rosewell v. LaSalle National Bank*, 450 U.S. 503, 517 (1981), or has the opportunity to assert a defensive argument against the assessment or collection of a state tax in a judicial proceeding, *Ashton v. Cory*, 780 F.2d 816, 819-20 (9th Cir. 1986) (*citing Kohn v. Central Distributing Co.*, 306 U.S. 531, 533-34 (1939)). As this Court said in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300-301 (1943):

> [I]t is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.

There can be no question that Florida has a "plain, speedy and efficient remedy." Not only has the Eleventh Circuit Court of Appeals made that specific finding, see *Osceola v. Florida Department of Revenue*, 893 F.2d 1231 (11th Cir. 1990), *cert denied*, 498 U.S. 1025 (1991); *Winicki v. Mallard*, 783 F.2d 1567, 1570 (11th Cir.), *cert. denied*, 479 U.S. 815 (1986), but various

cases arising in the Florida state courts such as *Wardair v. Department of Revenue*, 455 So. 2d 326 (Fla. 1984), *affirmed, Wardair v. Department of Revenue*, 477 U.S. 1 (1986); *Division of Alcoholic Beverages and Tobacco v. McKesson Corporation*, 524 So.2d 1000 (Fla. 1988), *reversed McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), *on remand Division of Alcoholic Beverages and Tobacco v. McKesson Corporation*, 574 So.2d 114 (Fla. 1991), and *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304 (Fla. 1990), *on remand, Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459 (Fla. 1992), give testimony that the Florida courts do, as this Court in *Great Lakes Dredge* demanded, permit a Florida taxpayer, in challenging a Florida tax, to "assert his federal rights and secure a review of them by this Court." In this case the circuit court and Florida Supreme Court both heard Petitioners' federal rights and decided the case in favor of the Petitioners based upon the State's violation of the Commerce Clause. Both courts granted Petitioners their requested declaratory relief under Florida's declaratory judgment law, Chapter 86, Florida Statutes.

Under the circumstances, the decision of the Supreme Court of Florida in *Kuhnlein* was not inconsistent with the Supremacy Clause and its requirement for uniformity and concurrency. Neither *Howlett*, nor any other decision of this Court, requires the states to hear a

claim for relief than cannot be heard in a federal court.

2. **THE DECISION BELOW DOES NOT CONFLICT WITH OTHER STATE SUPREME COURTS ON THE SAME QUESTION OF FEDERAL LAW**

Petitioners contend that the states are sharply divided over the question of a taxpayer's ability and right to raise the taxpayer's federal rights, and have those rights vindicated in a state court, when a state tax law conflicts with the federal right. However, there is no conflict over this point since the states have "plain, speedy and efficient" remedies. These remedies included an opportunity to have the taxpayer's federal rights heard in the state court and the ability to appeal a tax decision interpreting federal rights to the this Court. Because the states provide adequate remedies, there is no need to add a federal remedy, particularly one unavailable in federal court to the state taxpayer, just to provide an avenue for attorney's fees. Among those state decisions finding that where there are adequate state remedies there is no need to turn to § 1983 include *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 879 P.2d 137 (Okla.), *cert granted*, ___ U.S. ___, 115 S.Ct. 714 (1994); *State v. Quill*, 500 N.W.2d 196 (N.D.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 173 (1993); *L.L. Beam, Inc. v. Bracy*, 323 S.E.2d 381 (Tenn. 1991); *Linderkamp v. Bismarck School District No.1*, 397 N.W.2d 76 (N.D. 1986), *Zizka v. Water*

*Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985), *Davis v. City of Elkhorn*, 132 Wisc.2d 394, 393 N.W.2d 95 (1986); *Stufflebaum v. Panathiere*, 691 S.W.2d 271 (Mo. 1985); *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *affirmed by an equally divided court*, 471 U.S. 82 (1985); *W.H. Backus v. Chivilis*, 236 Ga. 370, 224 S.E.2d 370, 374-75 (1976); *Vann v. DeKalb County Bd. of Tax Assessors*, 186 Ga. App. 208, 367 S.E.2d 381 (1988); *Louisiana Life, Ltd. v. McNamara*, 504 So. 2d 900, 906 (La. App. 1 Cir. 1987); *Raschke v. Blancher*, 141 Ill.App.3d 813, 96 Ill.Dec. 711, 491 N.E.2d 1171, 1174 (1986); *Johnson v. Gaston County*, 71 N.C. App. 707, 323 S.E. 381 (1984).

The decisions of these states are consistent with the Tax Injunction Act, the Supremacy Clause and the decisions of this Court. State taxpayers "must seek protection of their federal rights by state remedies." *See, e.g., Fair Assessment*, 454 U.S., at 116. The principles of comity and federalism, in light of Congress' express intention to retain jurisdiction of state tax matters in state courts, require taxpayers to use state remedies in challenging state taxes. The end result is that there is uniformity throughout the United States. Federal courts do not hear state tax matters and state courts utilize state remedies in protecting federal rights.

## CONCLUSION

Because there is no real conflict between the states on this question, the Writ in the case before this Court should be denied.

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Supreme Court, U.S.
FILED
1995

No. 94-1443

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD ADAMS and BALANCE CHOW,

*Petitioners,*

v.

FRED O. DICKINSON, III, and LAWTON CHILES,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Florida**

## REPLY MEMORANDUM OF PETITIONERS

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## REPLY MEMORANDUM OF PETITIONERS

In their petition for a writ of certiorari, Petitioners showed that there were three grounds for granting the writ: (i) the Florida Supreme Court overlooked the requirements of *Dennis v. Higgins*, 498 U.S. 439 (1991), and *Howlett v. Rose*, 496 U.S. 356 (1990), by refusing to accept jurisdiction of Petitioners' claims under 42 U.S.C. §§ 1983 and 1988 while accepting jurisdiction of similar state-law causes of action; (ii) the decision below raises an important federal question on which state courts are sharply divided; and (iii) this Court has acknowledged the importance of resolving this issue by granting certiorari in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, No. 94-688 (Jan. 6, 1995).

In their brief in opposition, Respondents do not raise any procedural grounds for denying the writ. They do not challenge Petitioners' claim that the federal question was properly raised and preserved at each stage of the state court proceeding. Respondents' Brief in Opposition ("Opp. Br.") 6-11. They do not dispute Petitioners' contention that there is no independent and adequate state ground for the decision below. Opp. Br. 16 ("a state law basis was not used . . . to deny Petitioners' federal remedy under § 1983"). And they do not dispute Petitioners' claim that the federal question raised in this case mirrors the question presented in *National Private Truck Council*. *See* Opp. Br. 20 (both are "state decisions finding that where there are adequate state remedies there is no need to turn to § 1983" in view of the Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1988)). Instead, Respondents argue that the decision below does not conflict with *Dennis* and *Howlett*, and that the state courts are not in fact divided on this issue. Opp. Br. 11-21. Respondents are wrong.[1]

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[1] At one point in their brief, Respondents suggest that "[i]n the proceeding before the Florida Supreme Court there was virtually no discussion of 42 U.S.C. § 1983." Opp. Br. 9. Nothing could be further from the truth. Petitioners devoted 7 pages of their merits briefs to this issue, and their entire petition for rehearing to this issue; Respondents devoted 26 pages of their merits briefs to this issue; an

Respondents initially err in suggesting that *Dennis* and *Howlett* do not "require[]" state courts to entertain § 1983 claims in state tax cases. Opp. Br. 12. *Dennis* makes clear that § 1983 redresses tax statutes that violate the Commerce Clause (and indeed did not hesitate in permitting such a challenge to be raised through state courts). 498 U.S. at 451. *Howlett* makes clear that a state violates the Supremacy Clause through its "refusal to entertain . . . § 1983 claims" when it "entertains similar state-law actions against state defendants." 496 U.S. at 375. Accordingly, once a state opens its courthouse doors to certain types of state-law causes of action, it cannot discriminate against similar federal-law causes of action. Since Petitioners raised their § 1983 claim in courts of general jurisdiction that entertain related state-law causes of action, *see Howlett*, 496 U.S. 356 (addressing the authority of Florida courts of general jurisdiction), those courts were indeed required to entertain Petitioners' claim.

*Howlett* and *Dennis*, to be sure, did not address the Tax Injunction Act. But Respondents err in suggesting that the Act somehow alters this analysis. Opp. Br. 13-20. First, the Act by its plain terms does not limit or even speak to the scope of state court jurisdiction. It only limits the jurisdiction of federal "district courts" in state tax matters. 28 U.S.C. § 1341.

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amicus party devoted all 21 pages of its brief to this issue; and a significant amount of oral argument and questioning from the Bench was devoted to this issue. What Respondents apparently mean to suggest is that the Florida Supreme Court did not devote much of its *opinion* to this issue. While acknowledging that the § 1983 question had been properly raised and briefed, 646 So.2d at 720, 725, the Court inexplicably declined to grant relief on the ground that "the statute must be declared facially unconstitutional" on federal grounds. *Id.* at 725. This explanation, however, does not preclude further review by this Court. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n. 3 (1973); *Street v. New York*, 394 U.S. 576, 581-85 (1969); *New York ex rel. Bryant v. Zimmermann*, 278 U.S. 63, 67 (1928). Indeed, Respondents have not argued otherwise.

Second, Respondents' interpretation of the Act works a repeal by implication of § 1983's application to unconstitutional state taxes. *See* 42 U.S.C. § 1983 (applying to the "deprivation of *any*" constitutional rights) (emphasis added). Here, Petitioners initially sought § 1983 relief in federal court, but their claim was dismissed under the Tax Injunction Act. Petitioners then filed the same claim in state court, but it was rejected there as well. Respondents' interpretation of the Act thus prevented Petitioners from filing their § 1983 claim in *any* court, thereby repealing § 1983's application to an unconstitutional state tax. Not one of the requirements for such a repeal by implication, however, has been met; indeed, Respondents have not even attempted to meet such requirements. *See Morton v. Mancari*, 417 U.S. 535, 550 (1974) (requiring an "intention to repeal" or an "irreconcilable" conflict between two statutes); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (repeals by implication are highly "disfavored") (internal quotations omitted). In the final analysis, the Tax Injunction Act simply does not deprive individual taxpayers of relief under § 1983 and § 1988 from unconstitutional state taxes. Respondents err in arguing to the contrary.

Respondents also err in claiming that "[t]he states are all in unison" on this issue, that "there is no conflict over this point among the state courts." Opp Br. 12, 20-21. This argument overlooks the Court's grant of certiorari in *National Private Truck Council. Inc. v. Oklahoma Tax Commission*, No. 94-88 (Jan. 6, 1995), which itself suggests that a conflict exists among state courts on this question.[2] Moreover, in claiming no conflict, Respondents merely cite state court cases that are consistent with the Florida Supreme Court's decision. They make no effort to

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[2] "State courts have split on whether, in a State tax dispute, a plaintiff may maintain a § 1983 action where an adequate State remedy exists. . . . Further, the United States Supreme Court has recently granted certiorari in the case of *Private Truck Council of Am., Inc. v. Oklahoma Tax Comm'n.* . . . [T]he law in this area is uncomfortably unsettled. . . ." *Perini Corp. v. Commissioner*, 647 N.E.2d 52, 58-59 (Mass. 1995) (citations omitted).

discuss, much less acknowledge, the state court cases cited by Petitioners that go the other way.[3] Plainly, in short, there is a sharp conflict among the states on this issue; the Court recognized the importance of that conflict in granting certiorari in *National Private Truck Council*; and *National Private Truck Council* raises the same issue that is presented in this case.[4]

Petitioners ask the Court to grant certiorari and to set the case for argument. In the alternative, they request the Court to grant certiorari in the case, vacate the decision below, and remand the case for reconsideration in light of the Court's disposition of *National Private Truck Council*.

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[3] *Compare Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992), *cert. denied*, 113 S.Ct. 3002 (1993), *and Murtagh v. County of Berks*, 634 A.2d 179 (Pa. 1993), *cert. denied*, 114 S.Ct. 1397 (1994), which required § 1983 and § 1988 claims filed in state tax cases to be entertained in state court, *with Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n*, 879 P.2d 137 (Okla. 1994) *cert. granted*, 115 S. Ct. 714 (1995), and *North Dakota v. Quill Corp.*, 500 N.W.2d 196 (N.D.), *cert. denied*, 114 S.Ct. 173 (1993), which declined to entertain § 1983 and § 1988 claims in state court in state tax cases. *See also General Motors Corp. v. City of Linden*, 653 A.2d 568, 574 (N.J. Super. 1995) (holding that state court is proper forum for a § 1983 action in a tax case) and *Bielski v. Zorn*, 627 N.E.2d 880, 888 (Ind. Tax 1994) (holding state board of tax commissioners has jurisdiction over § 1983 claims in tax cases).

[4] In *National Private Truck Council*, it is true, the taxpayers were corporations, whereas in this case they are individuals. It is unclear why that distinction would affect the scope of the right to file a § 1983 and § 1988 action in state court in state-tax cases. But, to the extent such a distinction exists, the plight of the individual who may not rely on § 1983 to strike an unconstitutional tax and on § 1988 to recoup attorney's fees for doing so is arguably worse than that of a corporation.

## CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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